Supreme Court, U.S.
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No. 84-1942

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

HENRY GERRARD CLAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SUPPLEMENTAL BRIEF OF PETITIONER NATIONWIDE MUTUAL INSURANCE COMPANY

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November 26, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

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NATIONWIDE MUTUAL INSURANCE COMPANY,

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HENRY GERRARD CLAY,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SUPPLEMENTAL BRIEF OF PETITIONER NATIONWIDE MUTUAL INSURANCE COMPANY

This supplemental brief pursuant to Rule 22.6 seeks to correct a serious inaccuracy in Respondent's Supplemental Brief filed September 30, 1985. That brief includes a copy of the Stipulation for Dismissal in Justice Embry's bad faith action against Blue Cross and Blue Shield of Alabama[1] (hereinafter "Blue Cross"). Respondent argued

[1] That stipulation was dated April 12, 1985, and filed *after* the fact of Justice Embry's involvement in the questioned decisions of the Supreme Court of Alabama.

that the terms of that stipulation "demonstrate that Justice Embry's actions of which Nationwide complains were in no way motivated by self-interest."[2]

The stipulation is silent as to any payment. It now appears there was an additional agreement that the terms of settlement were to be kept secret and that Justice Embry in fact received $30,000.00 in the Blue Cross case. Justice Embry was quoted in *The Los Angeles Times* of Sunday, November 3, 1985, as having received "a 'nice sum' in a settlement with the company." (A-22) The amount was ascertained in a deposition taken on November 14, 1985, of A. Grey Till, Jr., Vice President and General Counsel of Blue Cross. (A-32) Till testified that shortly following the January 10, 1985, deposition of Justice Embry in the Blue Cross case, Eugene Rutledge, Justice Embry's lawyer, said that Justice Embry "would be interested in resolving the case for an amount," which Till recalled as $100,000.00. (A-41)

Till further testified that on April 5, 1985, Rutledge said:

> ". . . he had been able to see Embry the previous night and that he had been able to get Embry to agree to accept $50,000.00 for settlement of the case, with waiver by Rutledge of his attorney's fee." (A-43, A-118)

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[2] The Appellees' brief filed in the related case of *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984), *appeal docketed*, 53 U.S.L.W. 3759, *probable jurisdiction noted*, 53 U.S.L.W. 3843 (May 28, 1985) (No. 84-1601) went even further by stating: " . . . that suit was dismissed by stipulation of the parties *without payment of any sum.*" Lavoie brief, p. 18 (emphasis added) (*See* Appendix at A-6).

The eventual settlement amount was $30,000. (A-43, A-94) On April 12, 1985, Rutledge wrote the Blue Cross defense attorney as follows:

> "I have deposited the $30,000 check and sent my trustee check to Judge Embry along with the confidentiality agreement." (A-51)

Till testified that, to his knowledge, no other member of the class in Justice Embry's class action received any monetary relief. (A-81)

Justice Embry's settlement was on April 12, 1985. Nationwide's motion for disqualification had been denied April 5, 1985.

Respectfully submitted,

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IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CIVIL ACTION NUMBER: CV-78-001148-K

HENRY GERRARD CLAY,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant,

MOTION FOR LEAVE TO TAKE DEPOSITION
PENDING APPEAL

Comes now defendant-appellant NATIONWIDE MUTUAL INSURANCE COMPANY ("Nationwide") and moves the Court, pursuant to Alabama Rules of Civil Procedure Rule 27(b), to allow the taking of a deposition pending the appeal of this case in the Supreme Court of the United States. As grounds for this motion, Nationwide shows unto the Court as follows:

1. A petition for certiorari in this matter is pending in the Supreme Court of the United States. *Nationwide Mutual Insurance Co. v. Clay*, No. 84-1942.

2. A case involving issues substantially similar to the issues in this case, *Aetna Life Ins. Co. v. Lavoie*, No. 84-1601, has already been granted review by the Supreme Court of the United States. Oral argument is scheduled in that case for December 4, 1985.

3. The judgements in both cases have been stayed by orders of Justice Lewis F. Powell, Circuit Justice for the Eleventh Circuit.

4. One of the major issues presented in these cases involves the question of disqualification of former Justice T. Eric Embry due to his interest in a similar lawsuit

against Blue Cross and Blue Shield of Alabama ("Blue Cross") involving the developing law of bad faith.

5. In their argument on this issue, the appellees in *Aetna Life Ins. Co. v. Lavoie* have stated that Justice Embry's case against Blue Cross "was dismissed by stipulation of the parties *without payment of any sum.*" (See Exhibit A) (Emphasis supplied.)

6. Similarly, the respondent in *Nationwide Mutual Insurance Co. v. Clay* has, by filing a supplemental brief setting forth the parties' Stipulation of Dismissal in *Embry v. Blue Cross,* implied that Justice Embry received no pecuniary benefit from the dismissal. (See Exhibit B)

7. However, Justice Embry was quoted in a news story appearing in the November 3, 1985, *Los Angeles Times* as saying he received a "nice sum" in a settlement with that company. (See Exhibit C)

8. A question exists as to whether Justice Embry received any payment or pecuniary benefit from the settlement and dismissal of his action against Blue Cross.

9. Nationwide contends in this appeal that the terms of Justice Embry's settlement, occurring after the fact of his involvement in the decisions of the Supreme Court of Alabama, are irrelevant to whether Justice Embry had an interest in affirming large punitive damage verdicts and expanding the tort of bad faith *at the time of his participation in those decisions.* However, since the question has been raised and argued by the Respondents and Appellees in these two cases in opposition to Nationwide's contention that Justice Embry had a disqualifying interest, the facts and terms of the settlement should be made known

to the parties and to the Court before which the cases are presently pending on appeal.

10. Nationwide has been unable to determine the terms of Justice Embry's settlement through informal means. Attached as Exhibit D is a copy of a letter dated October 22, 1985, from Nationwide's counsel to the attorney for Justice Embry in his action against Blue Cross. No response to that letter has been received.

11. A copy of the proposed deposition notice, setting forth the party to be deposed and the substance of the testimony to be elicited, is attached. (See Exhibit E)

12. The discovery herein requested under Rule 27(b) is proper to avoid a failure or delay of justice and to present a complete and accurate picture of the facts to the Supreme Court of the United States.

/s/ BERT S. NETTLES
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ORAL ARGUMENT IS REQUESTED.

/s/ BERT S. NETTLES

CERTIFICATE OF SERVICE

This is to certify that I have on this 6th day of November, 1985, served a copy of the foregoing Motion Upon the Honorable PATRICIA K. OLNEY, Post Office Box 8158, Mobile, Alabama 36608, WILLIAM G. SOMERVILLE, Esquire, 1700 First Alabama Bank Building, Birmingham, Alabama 35203-3272 (Attorney of record for Blue Cross), and W. EUGENE RUTLEDGE, Esquire, 1300 Brown-Marx Tower, Birmingham, Alabama 35203 (Attorney of record for Justice Embry), by depositing a copy of same in the United States Mail, properly addressed with adequate postage thereon.

/s/ BERT S. NETTLES

EXHIBIT A

No. 84-1601

In The
Supreme Court of the United States
October Term, 1985

Aetna Life Insurance Co.,
Appellant,

v.

Margaret W. Lavoie and Roger J. Lavoie, Sr.,
Appellees.

Brief of Appellees

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September 27, 1985

* * *

(18)

Essentially, Appellant argues that the Alabama statute would be better taken if it were more limited. But the Alabama legislature concluded that the statute should apply automatically, perhaps believing that the deterrent effect on non-meritorious appeals would be greater and the burden on the courts of enforcing the penalty would be less. Whether that is so is the business of the legislature. As the Court held in *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955),

> "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

III. JUSTICE EMBRY'S PARTICIPATION DID NOT DEPRIVE APPELLANT OF DUE PROCESS

At the time this case was under consideration by the Supreme Court of Alabama, Justice T. Eric Embry, a member of the court's majority and apparently the author of the court's opinion, was the plaintiff in a putative class action suit against a different insurer, Blue Cross and Blue Shield of Alabama, which alleged a pattern of improper and bad faith denials of insurance claims.[13] As will be discussed *infra*, that suit was dismissed by stipulation of the parties without payment of any sum.[14]

---

[13] Another suit involving a claim by Justice Embry, *Embry v. Maryland Cas. Ins. Co.*, DV 84-963 (Jefferson Cty. Dist. Ct.), was settled almost immediately upon the filing of the complaint when the insurer agreed to pay the claim. Those proceedings had terminated on April 6, 1984, before the oral argument or the decision in this case.

[14] Although the class action suit was dismissed on April 16, 1985, Appellant did not reveal this fact in its Reply Memorandum filed May 14, 1985, or in its brief (apart from the docket sheet appended to the brief). The fact that Appellant continued to argue the effect of the Blue Cross suit after it knew that it had been dismissed and the circumstances of the dismissal (*see infra* pp. 21-25) is unfortunately similar to the series of misrepresentations resorted to by Appellant below (*see supra* pp. 1-6) which resulted in the punitive damage award.

(19)

Without pointing to anything in the opinion or proceedings of the court below which evidences improper bias on the part of Justice Embry, Appellant relies on the mere existence of the suit and a few out-of-context remarks by Justice Embry in a deposition to claim that his participation in the nine-member court's consideration of the case deprived it of due process and, further, that any remaining members of the court who did not remove themselves from the plaintiff class must also be disqualified from considering the case on remand.[15] Despite Appellant's arguments, Justice Embry's lawsuit did not require his disqualification or, by extension, the disqualification of the other justices of the Alabama court.

A. Questions as to the Qualifications of a Justice of a State Supreme Court Are Limited and Should be Left to the Discretion of the Justice

Since this case arises from a state court, this Court's review is limited to determining whether there has been a constitutional violation as opposed to deciding whether Justice Embry's role conflicts with standards set by statute or by a court's supervisory powers. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), the Court explained that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." The Court in *FTC v. Cement Institute*, 333 U.S. 683, 702

[15] This is a different position than that taken by Appellant in its Jurisdictional Statement (at 9 n.2) where it stated that it "does not bring to this Court the question of whether the membership of the eight other Justices . . . in the putative class . . . [is] sufficient to disqualify those Justices under the Due Process Clause . . . from future participation in this case on remand. . . ." Having specifically set aside any question relating to the members of the court other than Justice Embry, Appellant cannot add an issue concerning them now. *See* Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376, 386 n.12 (1960). In any event, since the case has been settled, there can be no question about the qualifications of the remaining justices.

* * *

EXHIBIT B

No. 84-1942

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

—o—

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

HENRY GERRARD CLAY,
Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

—o—

SUPPLEMENTAL BRIEF OF RESPONDENT

—o—

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Gulf Atlantic Life Ins. Co. vs. Barnes, 405 So.2d 916 (Ala. 1981) 2

No. 84-1942

—o—

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

—o—

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

HENRY GERRARD CLAY,
Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

—o—

SUPPLEMENTAL BRIEF OF RESPONDENT

—o—

This supplemental brief is presented pursuant to Rule 22.6 in order to bring to the attention of this Court information concerning the status of an unreported case not known to the respondent Henry Gerrard Clay (hereafter Clay) at the time of the filing of his Response in Opposition to the Petition for Writ of Certiorari of Nationwide Mutual Insurance Company (hereafter Nationwide). Specifically, Respondent Clay believes it necessary to inform the Court of the outcome of the suit by Justice T. Eric Embry against Blue Cross-Blue Shield of Alabama.

(2)

In its Petition Nationwide urges this Court to require the disqualification of Justice Embry from the appellate decision in this case, although the Supreme Court of Alabama refused to do so, because he had brought a civil action in the Circuit Court of Jefferson County (Birmingham) Alabama against Blue Cross-Blue Shield of Alabama seeking punitive damages for the tort of bad faith failure to pay insurance proceeds. Nationwide portrays Justice Embry's suit against Blue Cross-Blue Shield as "his own million dollar bad faith action" and argues:

> The substantial financial interest of Justice Embry as manifest in the obvious fact that the settlement value of Justice Embry's action against Blue Cross-Blue Shield of Alabama, App. C, *infra* 46a-56a, has been enhanced by the two decisions of the Supreme Court of Alabama in *Aetna vs. Lavoie* and the instant case.
>
> Petition p. 11, n.6

Nationwide's Reply Brief reiterates this characterization and claims:

> [T]he settlement value of Justice Embry's bad faith case against Blue Cross-Blue Shield has been greatly enhanced by the Alabama Supreme Court's ruling in this case as well as *Aetna Life Ins. Co. vs. Lavoie*, — So. 2d —, 19 A.B.R. 272 (Ala. Dec. 8, 1984), *appeal docketed*, 53 U.S.L.W. 3759, *probable jurisdiction noted*, 53 U.S.L.W. 3843 (May 28, 1985) (No. 84-1601) [hereinafter *Aetna vs. Lavoie*]. The previous high water mark for bad faith punitive damages in Alabama was $100,000, a figure remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co. vs. Barnes*, 405 So.2d 916, 926 (Ala. 1981). The $3.5 million and $1.25 million punitive damage verdicts affirmed in *Aetna vs. Lavoie* and the present case,

respectively, put Justice Embry's claim in the 'million dollar plus' potential verdict range.[1]

* * *

[1] The facts of Justice Embry's bad faith lawsuit against Blue Cross-Blue Shield were discussed in Justice Embry's deposition taken January 10, 1985. A transcript of that deposition is already on record in this court in *Aetna vs. Lavoie*. *See* Jurisdictional Statement of Aetna Life Ins. Co., App. p. 145a. A copy of Justice Embry's complaint in that case is included in Nationwide's petition, App. C, p. 46a.

Reply Brief p. 1.

As pointed out in the preceding footnote, a copy of Justice Embry's complaint against Blue Cross-Blue Shield is included in the Appendix to Nationwide's Petition for Writ of Certiorari at pp. 46a-56a. Omitted from Nationwide's Petition and Reply Brief, however, is any reference to the fact that Justice Embry's suit against Blue Cross-Blue Shield was dismissed with prejudice on April 16, 1985, eleven days after the Supreme Court of Alabama unanimously denied Nationwide's Motion for Withdrawal of Opinion and Suggestion of Disqualification. See Petition, App. B, pp. 29a-30a.

Copies of the Order of Dismissal and Stipulation for Dismissal were first provided to Respondent Clay on September 26, 1985 and they are attached as an Appendix to this Supplemental Brief for the review of the Court. Respondent Clay submits that the terms of the Stipulation for Dismissal demonstrate that Justice Embry's actions of which Nationwide complains were in no way motivated by self-interest. His refusal to disqualify himself was entirely proper, as was the decision of the other justices of the Supreme Court of Alabama not to require his disqualification. Consequently, Respondent Henry Gerrard Clay would once again urge this Court to defer to the

judgment of the Supreme Court of Alabama on this issue, and deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(App. 1)

APPENDIX

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

(Filed April 16, 1985)

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, [sic] and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the 16th day of April, 1985.

/s/ Jack D. Carl
CIRCUIT JUDGE

(App. 2)

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO.: CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

STIPULATION FOR DISMISSAL

(Filed April 16, 1985)

Come now the plaintiff, T. Eric Embry, and the defendant Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a) (1) of the Alabama Rules of Civil Procedure, hereby stipulate that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for and intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

(App. 4)

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the 12th day of April, 1985.

T. ERIC EMBRY

By: /s/ W. Eugene Rutledge
As His Attorney

BLUE CROSS AND BLUE SHIELD OF ALABAMA

By:/s/ William G. Somerville, Jr.
As Its Attorney

(App. 5)

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN EQUITY

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, the undersigned, as Register of the Circuit Court, Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing contains a full, true and correct copy of the instrument herewith set out as appears of record in said Court.

Witness my hand and seal of said Court, this the 29th day of August, 1985.

/s/ Douglas L. Cockrell
Register

By: /s/ C. Houtz
Deputy Register

EXHIBIT C

(Front Page of Newspaper)

LOS ANGELES TIMES

Sunday, November 3, 1985

Refusal to Pay Claim Can Cost Millions

Insurers Challenge Huge 'Bad Faith' Case Awards

By Philip Hager, *Times Staff Writer*

WASHINGTON — When Margaret Lavoie and her husband first went to court in Mobile, Ala., in 1978, they were merely trying to recover the modest sum of $1,650.22 they said the Aetna Insurance Co. still owed them on a $3,028.25 claim they had submitted to cover her hospital bills.

Six years later, after the Alabama Supreme Court ruled on the case, the couple stood to collect a cool $3.5 million in punitive damages for the company's "bad faith" failure to pay the claim—along with $1 million in interest and a $350,000 penalty for Aetna's unsuccessful appeal to the court.

The company, staggered by the prospect of paying 3,000 times more than the Lavoies had sought, has appealed this unusual case to the U.S. Supreme Court. At issue are:

•The legality of virtually unlimited punitive damage awards, which are becoming increasingly common throughout the nation.

•The validity of an automatic 10% penalty that Alabama adds to monetary judgments against defendants who unsuccessfully appeal such awards.

•The ethical conduct of an Alabama Supreme Court justice who wrote the majority opinion in the 5-4 decision against Aetna, when, unknown to the company, the judge himself had filed two similar bad faith lawsuits against other insurance companies.

The Supreme Court's decision figures to have broad impact beyond the dispute between Aetna

Please see AWARDS, Page 27

(Sunday, November 3, 1985/Part I 27)

AWARDS: Insurers Challenge Huge Cost of 'Bad Faith' Cases

Continued from Page 1

and the Lavoies. In recent years, enormous punitive-damage awards have increased markedly around the nation. In California since 1983, juries have awarded such damages in well over 200 cases, with verdicts totaling $450 million.

According to the Assn. of California Insurance Companies, much of the increase in punitive damage awards can be attributed to the expansion of the "bad-faith" doctrine—a right, recognized by a growing number of states, to bring suits and collect punitive awards against insurance companies that unfairly refuse to pay a claim.

Consumer Costs Driven Up

The trend has caused widespread concern within the insurance industry, which fears the size and unpredictability of such awards will create administrative havoc and drive up costs to consumers.

On the other side, lawyers who bring such cases defend big awards is justifiable punishment and a highly effective deterrent when large, financially powerful companies wrongly deny legitimate claims by policyholders. The attorneys representing the Lavoies accuse Aetna of "gross misconduct" in knowingly deceiving the couple in denying their claim four times.

The $1,650.22 in dispute included charges for inpatient diagnostic tests and hospital room and board, items the Lavoies said were necessary to determine whether she suffered from an abdominal or intracranial disease. The company said that the tests were not the ones customarily given in such instances and that they could have been given on an outpatient basis.

In their lawsuit, the Lavoies asserted that Aetna failed to have its own medical staff review the case before it denied the claim and that it ignored evidence that would have upheld the claim. The case went to trial in 1982 and the jury ruled for the Lavoies, deciding after only 50 minutes to award the couple $3.5 million in punitive damages.

Last December, the Alabama Supreme Court upheld the award, finding that there was "overwhelming" evidence of bad faith on the part of Aetna. The majority opinion, unsigned but later disclosed to have been written by Justice T. Eric Embry, concluded that the Lavoies had shown that "the dark shadows of fraud and conspiracy enveloped each and every aspect of Aetna's actions."

The court added 10% to the $3.5-million verdict under a state law that automatically penalizes unsuccessful appeals of such cases. With interest, Aetna faced a judgment approaching $5 million.

It was not until later, the company said, that it learned that Embry had previously filed two of his own bad faith actions seeking punitive damages against two other insurance companies. He had sued one for its refusal to pay a claim he had submitted for the theft of his late wife's mink coat. And he had filed a class-action suit, on behalf of him and other Alabama state employees, against another company for its alleged failure to promptly pay health insurance claims.

The first action was settled with the insurer agreeing to pay Embry's claim. *The second action also was eventually dismissed, with Embry receiving what he now says was a "nice sum" in a settlement with the company.*

The judge, now retired from the court and practicing law in Birmingham, flatly denies impropriety.

"My conscience is clear—it doesn't bother me at all," he said. "The insurance companies are desperate to fight these bad faith actions. They'll resort to anything."

Aetna, challenging what appeared to be the justice's conflict of interest in its case, asked the court to set aside its ruling. The court, without dissent, denied the request.

Aetna then brought an appeal to the U.S. Supreme Court (Aetna vs. Lavoie, 84-1601). The justices agreed last June to review Aetna's appeal during the current term, and a decision is expected by next spring.

Constitutional Defense

The company contends that the huge damage award violates Eighth Amendment prohibitions against "excessive fines"—a provision historically aimed at protecting

defendants in criminal cases. Such a disproportionate penalty serves no purpose except to provide a windfall to winning plaintiffs, the company argues.

The American Insurance Assn., one of several insurance groups backing Aetna, observes that many large punitive damage awards far exceed any known criminal case fines. In the first half of 1985, juries in five California cases awarded $242 million in punitive damages, subject to reduction by the courts. The association is urging the court to provide new guidelines or limitations on such awards.

Aetna says that the automatic 10% penalty on unsuccessful appeals unfairly discourages losing defendants from exercising their right to appeal and makes no distinction between frivolous or delaying actions and serious, meritorious actions.

The attorneys representing the Lavoies counter that punitive damage awards have long been recognized as a valid civil penalty and that the $3.5-million award against Aetna was not excessive in view of Aetna's "egregious misconduct." The automatic 10% penalty is a legitimate way of deterring dilatory appeals that deprive plaintiffs like the Lavoies of prompt receipt of their award, the lawyers add.

As for Aetna's contention that Justice Embry should have removed himself from the case, the insurance company maintains that he had a "direct, pecuniary interest" in the outcome of the Aetna case because upholding the multi-million-dollar damage award enhanced the potential for recovery in his own cases.

"I have never seen a case where the appearance of a conflict of interest is as severe as it is here," said Larry L. Simms of Washington, an attorney for Aetna. ". . . The system of justice can't tolerate that kind of situation, no matter what was going on in his own mind."

Different Issues Claimed

Attorneys for the Lavoies, defending Embry's role in the case, say that his decision did not change Alabama law and that, contrary to Aetna's claims, he had no direct interest in the outcome because his own suits involved different claims and different issues.

In bringing suit against the health insurance company, Embry "wasn't really seeking money, but was seeking reform of the system," said Jack N. Goodman of Washington, an attorney representing the Lavoies. "His opinion in the Aetna case was limited to the circumstances in that case. It is very difficult to see how it could have affected his own case."

———

EXHIBIT D

NETTLES, BARKER & JANECKY
A Professional Corporation
LAWYERS
3311 First National Bank Building
MOBILE, ALABAMA
36602

October 22, 1985

Bert S. Nettles
E. Elliott Barker
J. F. (Jack) Janecky
Reggie Copeland Jr.
J. Stuart Wallace
Sidney W. Jackson III
Forrest S. Latta
Mark A. Newell

Mailing Address
Post Office Box 2987
Mobile, Alabama 36652
Telephone (205) 432-8786

FEDERAL EXPRESS

W. Eugene Rutledge, Esquire
Rutledge & Yearout
1300 Brown-Marx Tower
Birmingham, Alabama 35203

RE: Nationwide v. Clay
Aetna v. Lavoie
(*T. Eric Embry v. Blue Cross - Blue Shield of Alabama*)
NBJ File No. 111-3295

Dear Gene:

As you know, on June 3, 1985, the Supreme Court of the United States ordered oral argument in the appeal taken in *Aetna v. Lavoie*. The Court has not yet ruled on the petition for certiorari in *Nationwide v. Clay*, although the judgments in both cases have been stayed by the Supreme Court. I am writing you because a serious question has arisen relative to Justice Embry's settlement with Blue Cross and Blue Shield of Alabama.

On page 18 of the *Lavoie* brief recently filed in the Supreme Court, it is stated that the Blue Cross and Blue Shield of Alabama suit "was dismissed by stipulation of the parties without payment of any sum." Copies of the

April 16, 1985, dismissal order of Judge Carl and the April 12 stipulation for dismissal signed by you and Bill Somerville are included as an appendix to the Lavoie brief. However, nothing is said in the stipulation with respect to whether any payment was made by Blue Cross and Blue Shield of Alabama.

When I attempted to obtain information from Bill Somerville as to the particulars of that settlement, Bill advised me he could not discuss the terms of the settlement due to a confidentiality agreement with you. It is therefore necessary that I trouble you with this request for information relative to the terms of the settlement agreement between Justice Embry and Blue Cross-Blue Shield. Unless you are willing to either provide me with that information or to release Bill Somerville and/or his client from the confidentiality agreement, I have been instructed by my client to proceed with filing a Rule 27(b) motion seeking discovery of the information.

Enclosed for your information are copies of both the *Lavoie* brief and a supplemental brief later filed on behalf of *Clay*.

Please telephone me upon receipt of this request, as time is of the essence.

Very truly yours,

NETTLES, BARKER & JANECKY

BERT S. NETTLES

BSN:ss
Enclosures

cc: William G. Somerville Jr., Esquire
(Federal Express)

EXHIBIT E

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CIVIL ACTION NUMBER: CV-78-001148-K

HENRY GERRARD CLAY,

Plaintiff,

V.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

NOTICE OF DEPOSITION
AND SUBPOENA DUCES TECUM

TO: Honorable Patricia K. Olney
Reams, Vollmer, Philips,
Killion, Brooks & Schell
Post Office Box 8158
Mobile, Alabama 36608

William G. Somerville Jr. Esq.
Lange, Simpson, Robinson
& Somerville
1700 First Alabama Bank Bldg.
Birmingham, Alabama 35203

W. Eugene Rutledge, Esquire
Rutledge & Yearout
1300 Brown-Marx Tower
Birmingham, AL 35203-3272

Please take notice that the defendant in the above styled cause will take the testimony of Blue Cross and Blue Shield of Alabama on oral examination pursuant to Rule 30(b) (6) of the Alabama Rules of Civil Procedure, at the offices of ..... in Birmingham, Alabama, on the ..... day of November, 1985, beginning at .....:00..... M. Said deposition will be taken before ..... or

another officer duly authorized to take depositions and swear witnesses in said State.

The representative of Blue Cross and Blue Shield of Alabama will be expected to testify concerning the following matters:

1. All of the terms of the settlement and conditions for dismissal of *T. Eric Embry v. Blue Cross and Blue Shield of Alabama,* Civil Action No. 84-500-447-JDC, in the Circuit Court of Jefferson County, Alabama.

.....

BERT S. NETTLES
FORREST S. LATTA
Attorney for Defendant
Nationwide Mutual Insurance
Company

SUBPOENA DUCES TECUM

Pursuant to the attached subpoena duces tecum, the deponent is directed, at the taking of this deposition, to produce and permit inspection and copying of the following:

1. Any and all releases executed by or on behalf of any of the parties in *Embry v. Blue Cross and Blue Shield.*

2. Any and all agreements, letters, memoranda, notes and other writings in your possession or control evidencing or pertaining to any of the terms or conditions of the settlement and dismissal of *Embry v. Blue Cross and Blue Shield.*

BERT S. NETTLES

OF COUNSEL:

NETTLES, BARKER & JANECKY
3311 First National Bank Building
Post Office Box 2987
Mobile, Alabama 36652
Telephone: 205/432-8786

CERTIFICATE OF SERVICE

This is to certify that I have on this .....th day of October, 1985, served a copy of the foregoing Motion upon Honorable PATRICIA K. OLNEY, Post Office Box 8158, Mobile, Alabama 36608, WILLIAM G. SOMERVILLE, Esquire, 1700 First Alabama Bank Building, Birmingham, Alabama 35203-3272 (Attorney of record for Blue Cross), and W. EUGENE RUTLEDGE, Esquire, 1300 Brown-Marx Tower, Birmingham, Alabama 35203 (Attorney for record for Justice Embry), by depositing a copy of same in the United States Mail, properly addressed with adequate postage thereon.

BERT S. NETTLES

IN THE CIRCUIT COURT OF MOBILE COUNTY
CIVIL WITNESS REQUEST AND ORDER
TO APPEAR (SUBPOENA) CV. CASE NUMBER
CV-78-001148-K

HENRY GERRARD CLAY

Plaintiff

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

Defendant

Type service requested:

Personal ..... Mail .....

The clerk is requested to issue an order to appear (subpoena) for the following witness(es) to testify on behalf of: ..... (Plaintiff) XX (Defendant)

/s/ Bert S. Nettles
Requester

NAME AND ADDRESS

1. Blue Cross and Blue Shield of Alabama
Birmingham, Alabama

2. DUCES TECUM: To produce and permit inspection and copying of the following:

(1) Any and all releases executed by or on behalf of any of the parties in *Embry v. Blue Cross and Blue Shield.*

3. (2) Any and all agreements, letters, memoranda, notes and other writings in your possession or control evidencing or pertaining to any of the terms or conditions of the settlement and dismissal of *Embry v. Blue Cross and Blue Shield.*

M: Mailed First Class
PS: Personal Service
LR: Left at Residence
NF: Not Found

TO THE WITNESS: You are ORDERED TO APPEAR before the court as stated below until otherwise excused. This order is subject to all judicial enforcement and sanction.

DATE: Nov 14 1985
TIME: 10:30 AM
ADDRESS: 450 Riverchase Parkway East
Birmingham, AL

TO ANY SHERIFF OF ALABAMA: You are ordered to serve this subpoena on the above named person(s) at addresses given and make return in the space provided.

Nov. 13, 1985
Date Issued

ATTEST: MAURICE W. CASTLE, JR.,
CLERK

(p. 1) IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

CIVIL ACTION NO: CV-78-001148-K

HENRY GERRARD CLAY,

Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties through their respective counsel, that the deposition of *A. GREY TILL, JR.*, may be taken before Donna Mims Williams, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at the offices of Blue Cross and Blue Shield of Alabama, 450 Riverchase Parkway, Birmingham, Alabama, on the 14th day of (p. 2) November, 1985, commencing at 11:20 a.m.

IT IS FURTHER STIPULATED AND AGREED that the signature to and the reading of the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of Court relating to the taking of depositions.

IT IS FURTHER STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel as to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of the trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that notice of the filing of the deposition by the Commissioner is waived.

(p. 3) I N D E X

EXAMINATION BY:	PAGE NO.
MR. NETTLES	9-43 83-89
MS. OLNEY	43-83

EXHIBITS:

Defendant's Exhibit	1-10	6
Defendant's Exhibit	11	32
Defendant's Exhibit	12	39

(p. 4) BEFORE:

Donna Mims Williams, Commissioner.

APPEARING ON BEHALF OF THE PLAINTIFF:

Patricia K. Olney
Attorney at Law

Reams, Vollmer, Philips,
Killion, Brooks & Schell
Post Office Box 8158
Mobile, Alabama 36608

APPEARING ON BEHALF OF THE DEFENDANTS:

William G. Somerville, Jr.
Attorney at Law
Lange, Simpson, Robinson
& Somerville
1700 First Alabama Bank Building
Birmingham, Alabama 35203

Bert S. Nettles
Attorney at Law
Nettles, Barker & Janecky
3311 First National Bank Building
P. O. Box 2987
Mobile, Alabama 36652

(p. 5) I, Donna Mims Williams, a Registered Professional Reporter State of Birmingham, Alabama, and a Notary Public for the State of Alabama at Large, acting as Commissioner, certify that on this date pursuant to Rule 30 of the Alabama Rules of Civil Procedure, and the foregoing stipulations of counsel, there came before me at 450 Riverchase Parkway, Birmingham, Alabama, *A. GREY TILL, JR.*, witness in the above cause, for oral examination, whereupon the following proceedings were had:

MR. NETTLES: My name is Bert Nettles. I'm here on behalf of Nationwide Mutual Insurance Company relative to the deposition of Blue Cross/Blue Shield, which had been noticed for 10:30 this morning.

Unfortunately, those of us coming from Mobile had difficulty with airline connections. I missed a flight (p. 6) in Atlanta, which put me approximately twenty minutes late arriving for the deposition.

Patricia Olney, the attorney of record for Gerrard Clay, advised me earlier this morning that it appeared she would have airline problems leaving Pensacola and that it would probably be approximately twelve o'clock noon before she could arrive in Birmingham unless an earlier connection could be made.

So, at this time, we're suggesting that the exhibits or items to be produced in response to subpoena be identified and that the deposition be recessed until Ms. Olney's arrival.

(Whereupon, the deposition was in recess until 1:00 p.m.)

(Whereupon, Defendant's Exhibits 1 through 10 were marked for identification by the Reporter.)

MR. SOMERVILLE: I would like to state for the record that, on behalf of (p. 7) Blue Cross, we have declined requests heretofore to disclose the terms and circumstances of the settlement between Justice Embry and Blue Cross in the suit of Justice Embry against Blue Cross on the basis of an agreement against such disclosure entered into by Justice Embry and his attorney, Mr. Rutledge, and by Blue Cross and counsel for Blue Cross, which I would like to have put into the record as well.

MR. NETTLES: I believe that already is identified as Exhibit 8.

MR. SOMERVILLE: And we are offering Mr. Till as the representative of Blue Cross under Rule 30 (B) (6) under Alabama Rules of Civil Procedure, pursuant to the order obtained by Nationwide in the case of Clay against Nationwide for—to be deposed and seek discovery from Blue Cross respecting the terms and circumstances of that settlement, which motion was granted by Judge Kitrell in the (p. 8) Circuit Court of Mobile County, and subpoena issued to Blue Cross for production of documents pursuant to that order.

It is on the basis of that order and the subpoena directed to Blue Cross that Mr. Till is being offered. And such documents that have been produced and are being produced from Mr. Till's files are being produced here notwithstanding that agreement against disclosure of the terms of the settlement that has been marked as Exhibit 8.

I might also state that some of the correspondence that is being produced pursuant to the subpoena are com-

munications between attorney and client, which would be subject to the attorney-client privilege which, as to those particular items, we are not interposing, in view of the precise terms of the subpoena directed to those matters of correspondence.

If there should be any questions (p. 9) that might be raised as—that might be deemed—particular matters that should come up during the deposition relating to attorney-client communications, we may feel the need to interpose an attorney-client privilege objection at that time and reserve that right.

A. GREY TILL, JR., being first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. NETTLES:

Q. Would you state your full name, sir?

A. Arthur Grey Till, Jr.

Q. What is your occupation, Mr. Till, or profession?

A. I am an attorney. I serve as vice-president, general counsel and as corporate secretary for Blue Cross and Blue Shield of Alabama.

Q. How long have you held that (p. 10) position?

A. Held the position of vice-president and general counsel since April of 1984.

Q. How long have you been an employee of Blue Cross/Blue Shield? And incidentally, when I say Blue Cross/Blue Shield or Blue Cross, would it be understood by you, please, that I would be referring to Blue Cross/Blue Shield of Alabama?

A. Yes, sir.

Q. Fine. So how long have you been affiliated with Blue Cross?

A. Employed with Blue Cross since September of 1968.

Q. In a capacity as an in-house attorney for Blue Cross?

A. No, sir. In the capacity of an attorney since October of 1973, which was the month in which I was admitted to the Alabama bar. At that time, I became the staff counsel to the organization.

(p. 11) I believe, in January of 1974, I was elected to serve as secretary to the corporation and been recognized as an officer from that point in time and since.

Q. And you have been designated, as I understand it, as the representative of Blue Cross to testify here at this deposition in response to the subpoena that has just been identified as Defendant's Exhibit 10; is that correct?

A. Yes.

Q. And, of course, that subpoena was issued pursuant to Judge Kitrell's order of November 12, 1985, of which there's a certified copy identified for this deposition as Defendant's Exhibit 9; is that correct?

A. Yes, sir.

Q. You have furnished me some documents which have been marked Exhibits 1 through 8 in response to the duces tecum which accompanied the subpoena.

(p. 12) Would you explain to us what those documents are or represent, beginning with Exhibit Number 1 and then proceeding through the remaining ones?

A. Yes, sir. Defendant's Exhibit 1 is a copy of a letter from my files and dated March 26th of 1985; is a document addressed to Mr. Eugene Rutledge, an attorney for Judge Eric Embry in his previous litigation filed against Blue Cross, from William G. Somerville, Jr., on the letterhead of Lange, Simpson, Robinson and Somerville, who is our outside retained counsel generally, and particularly in this—Judge Embry's litigation against us, setting forth—do you wish me to summarize?

Q. No, sir, I don't think you need to summarize at this point, since this will be attached to the deposition.

I do note that you were noted as the recipient of a blind carbon copy. Is that correct?

(p. 13) A. Yes, sir.

Q. And Mr. Simpson is an attorney or a partner of Mr. Somerville; is that correct?

A. Yes, sir.

Q. And is it correct that Ms. Blaylock is an attorney also with Blue Cross?

A. Yes, sir. She serves as an associate counsel and reports to me in her capacity.

Q. Mr. Till, is this the first written reference in Blue Cross files or in any files, so far as you know, of settlement negotiations between Blue Cross and Justice Embry?

A. Yes, sir.

Q. Speaking now of Defendant's Exhibit 1?

A. Yes, sir.

Q. When were settlement negotiations first discussed?

A. As I recall, Judge Embry's—we (p. 14) had scheduled and had actually commenced Judge Embry's deposition in this matter—

Q. Was that on January 10, 1985?

A. Yes, sir, in mid-January. I don't recall the exact date.

Q. May I refresh your recollection? Would that have been January 10?

A. Yes, sir.

Q. 1985?

A. Yes, sir.

Q. Go ahead.

A. And at a point during those—during that deposition or following, as I recall, the attorneys, Mr. Somerville and Mr. Simpson, and the attorney, Mr. Rutledge, for Judge Embry, in the course of discussing the rescheduling of the deposition or the continuance of the deposition, as I recall the subject of discussion of which I was apprised was—first came at approximately that time.

I don't recall the exact dates (p. 15) or that sort of thing. But the subject, I think, was first raised between counsel for the parties at that time.

Q. Now, the deposition reflects that the deposition of Justice Embry was commenced at 10:00 a.m. on Janu-

ary 10, 1985, was recessed at his request, presumably, later that same day; is that correct?

A. I believe that's correct, yes, sir.

Q. Approximately what time was that?

A. It would have been late afternoon. And I want —4:30 to five, approximately, in the afternoon.

Q. Now, would these settlement discussions have occurred, then, later that same day or some days after January 10?

A. As I recall, it would have been sometime after that. My recollection—I'm not sure if it was the following day or a few days thereafter.

(p. 16) But there was discussions between counsel. And by counsel for the parties, unless I indicate otherwise, I mean our outside trial counsel, Messrs. Somerville and Simpson, and Mr. Rutledge on behalf of Judge Embry.

The subject first arose, as I recall, a day or so after the January 10th date.

Q. Who first broached the subject of settlement?

A. As I understand it, that would have—the first subject—it was first raised by Mr. Rutledge.

Q. Was there any offer made by Blue Cross/Blue Shield prior to the letter identified as Defendant's Exhibit 1?

A. No, sir.

Q. Do you recall whether—prior to the offer made in the letter of March 26th, Defendant's Exhibit 1, whether

a proposal or a settlement demand had been made by Justice Embry's counsel?

(p. 17) A. As I recall, Mr. Rutledge had indicated to our counsel that Judge Embry would be interested in resolving the case for an amount.

And I believe that amount, as best I recall, was one hundred thousand dollars, which in effect constituted the first settlement offer.

Let me add to that—and my memory is somewhat hazy here—but I think there was also some discussion coming from Mr. Rutledge.

And I was not a party to those discussions. So just what I recall from having heard from our counsel was that, at a point in time, they were also seeking some sort of relief on the part of the class which Judge Embry purported to represent in that litigation.

I don't recall—I don't know that there were ever any detailed discussions. But they were interested in some sort of class relief in addition to (p. 18) some sort of financial.

Q. The sum of one hundred thousand dodlars had been specifically mentioned by Justice Embry's counsel; is that correct?

MS. OLNEY: I'm going to object to the form. I believe he said he wasn't certain of the exact sum.

Q. Was that one hundred thousand dollars?

A. That is the sum I recall as having—that I was told was, in effect, their starting offer.

Q. Now, the other relief for the class that you've described, was that essentially what was eventually in-

cluded in the original proposed stipulation for dismissal that accompanied Mr. Somerville's letter of March 26, Defendant's Exhibit 1?

A. That—the stipulation for dismissal—the proposed stipulation for dismissal is, effectively, what we were suggesting would be appropriate.

Q. Was that suggestion by you, by (p. 19) Blue Cross, in response to the initial proposal by Mr. Rutledge for the monetary sum plus relief for the class?

A. Yes, sir.

Q. Would you proceed with describing Defendant's Exhibit 2?

A. Defendant's Exhibit 2 is a letter dated April 5th, addressed to me from William G. Somerville, Jr. It's a copy of the letter which is from my files in the Embry litigation.

Q. Who is Mr. Mandy and who would be Mr. Thrasher, the two gentlemen noted as recipients of copies of this letter, along with Ms. Blaylock?

A. Mr. William H. Mandy is president of Blue Cross/Blue Shield of Alabama. Mr. E. Gene Thrasher is vice-president of the marketing group of Blue Cross.

Q. Would it be correct, then, to say that the president of Blue Cross, Mr. Mandy, was himself actively involved in (p. 20) the settlement discussions within the Blue Cross network?

A. Yes, sir.

Q. Is it correct that, in the last sentence in the last paragraph of the first page of that letter, the following

appears: "He, Gene Rutledge, said that he had been able to see Embry the previous night and that he had been able to get Embry to agree to accept fifty thousand dollars for settlement of the case, with waiver by Rutledge of his attorneys' fee"? Is that—that sentence, as I read it, one that appears in the letter?

A. Yes, sir.

Q. So it is correct that Gene Rutledge had stated to your counsel that he would waive his attorneys' fee in the event settlement could be reached? Is that correct?

MS. OLNEY: Object to the form of the question.

A. Yes, sir.

(p. 21) Q. Do you know of anything or any subsequent change in that position by Mr. Rutledge?

A. No, sir.

Q. Now, eventually, as we'll see in the later documents, the settlement was concluded on the basis of thirty thousand dollars as a monetary sum and the stipulation providing certain relief for the class; is that correct?

A. Yes, sir.

Q. But you know of no change in Mr. Rutledge's position that he would waive any claim for attorneys' fee even had the monetary sum been fifty thousand dollars, do you?

MS. OLNEY: Object to the form of the question. And I'm also going to object because I don't know that this says that Rutledge is necessarily agreeing that he would waive the fee, so much as that Embry said that he would accept that amount if he would waive the fee.

(p. 22) I object that I don't know that this witness is competent to testify as to what the ultimate arrangements were between Justice Embry and Mr. Rutledge.

A. I have no indication one way or the other that Mr. Rutledge had changed his position as ultimately stated in this sentence.

Q. Other than is stated in Exhibit 2?

A. Yes, sir.

Q. And is it not correct that you were following this on a very close day-to-day basis with your counsel, Mr. Somerville and Mr. Simpson? Is that correct?

A. Yes, sir, that's correct.

Q. And is it not correct that you're presumably the most knowledgeable person with Blue Cross/Blue Shield with respect to the case brought by Justice Embry and eventually settled, that we're discussing here? Is that not correct?

(p. 23) A. Yes, sir, that would be a fair assessment.

Q. Is it not correct that, at that time, that the plaintiff, T. Eric Embry, was a supreme court justice of the Alabama Supreme Court?

A. Yes, sir.

Q. Would it be correct to state that this was a case of considerable sensitivity and concern to Blue Cross/Blue Shield?

A. Yes, sir.

Q. Will you describe Defendant's Exhibit 3? And, incidentally, all of these Exhibits 1 through 8, are these

records from your files relative to this Embry versus Blue Cross case?

A. Yes, sir.

Q. And these are authentic; is that correct?

A. Yes, sir.

Q. All right, sir. Now, would you briefly tell us what Defendant's Exhibit 3 (p. 24) represents?

A. This is a memorandum dated April 10th, 1985, addressed to Phillip Pope from myself in regard to the Embry litigation. Attached to that is a document entitled stipulation for dismissal.

Q. Who is Mr. Pope, Phillip Pope?

A. Mr. Pope is vice-president of Blue Cross. He is vice-president of the financial group within the organization.

Q. Is Blue Cross the largest provider of health care services of any insurance company doing business in Alabama?

A. We, Blue Cross, would have the largest volume of health business enrolled in the state of Alabama as an organization in terms of assets.

There are numerous companies domiciled outside of Alabama that would be larger in that context.

Q. My question was vague, but you correctly, in the first part of your (p. 25) answer, hit on the thrust of what I intended it to be; that, insofar as the business, the health care, insurance business written in Alabama, Blue Cross is the largest insurer. Is that not correct?

A. Yes, sir.

Q. But it provides the greatest percentage of the health care insurance coverage written in Alabama?

A. Yes, sir. You use the word insurer and insurance. And if you combine insured coverages and administered coverages under various financial arrangements which we might provide the benefits under either an insured or a noninsured, the answer would be correct, yes, sir.

Q. Now, I notice there is a provision on Exhibit 3 for approval by William H. Mandy, whom I understand is the president of Blue Cross, is that correct?

A. That's correct.

Q. In other words, this exhibit was (p. 26) prepared and addressed to Phillip Pope but apparently seeking the approval of the president of the company, the written approval; is that correct?

A. That's correct.

Q. Did Mr. Mandy provide his written approval for this settlement?

A. Yes, he did.

Q. Is this procedure typical in settlements of various legal actions brought against Blue Cross/Blue Shield, that the president of the company is requested to give his written consent?

A. Yes, sir.

Q. On all settlements?

A. It would not be the case in all settlements. One of this size would normally require that sort of approval.

Q. Would it be correct to say that, in your seventeen years experience and certainly during your years in which you've served as legal counsel with Blue Cross, that this is the most sensitive legal (p. 27) action in which you have been involved?

A. It would be hard to characterize which of several of them was most sensitive. But it would certainly be among the more sensitive.

Q. Was it Blue Cross's suggestion that the thirty thousand dollar monetary payment be characterized as partial payment of Embry's attorney's fees?

A. Yes, sir.

Q. Why?

A. In our discussions concerning proposed settlement or possible settlement, we felt that the only likelihood or possibility that we would have of obtaining some sort of settlement would be to, I guess, at a minimum—to offer, to provide some portion of the legal fees and expenses which we perceived had built up by that time by the opposing side.

Q. Even though Mr. Rutledge had stated to Mr. Somerville, as discussed in Mr. Sommerville's letter of April 5 to you, (p. 28) being marked as Defendant's Exhibit 2, that Embry had agreed to accept at that time fifty thousand dollars in settlement of the case with waiver by Rutledge of his attorney's fee, Blue Cross continued to characterize the monetary payment as partial payment of attorneys' fees; is that correct?

MS. OLNEY: Excuse me. Let me object. I'm going to object again. I don't believe that there's anything here

to indicate what the ultimate arrangement was as far as attorneys' fees between Mr. Rutledge and Justice Embry, and I don't think this witness is in the position to know that or to assume that when the money changed necessarily. So the ultimate arrangement was made otherwise between Mr. Rutledge and Justice Embry.

Q. Was your answer yes?

A. I don't recall the previous question.

(Whereupon the last question was (p. 29) read back by the Reporter.)

THE WITNESS: Yes.

Q. There was never any request by Mr. Rutledge at that point in time subsequent to the April 5 letter that the monetary payment, if involved in the settlement, should be characterized as attorneys' fees, was there?

A. I don't know whether—

Q. You know of no—

A. I know of no request one way or the other.

Q. Would you turn to Defendant's Exhibit 4 and tell us what that is?

A. Exhibit 4 is a letter dated April the 10th, 1985, addressed to Mr. William G. Somerville in regard to the Embry litigation from me.

Attached to that is a copy of the check dated April the 10th, 1985, in the amount of thirty thousand dollars addressed to Rutledge, Fay and Kelly, P.C., transmittal letter to me from (p. 30) Mr. Somerville enclosing the thirty thousand dollar settlement amount.

Q. So that letter from you to Mr. Somerville and the accompanying check, both being Defendant's Exhibit 4, were dated the same day as the interoffice memo marked as Exhibit 3 which had been approved by the president; is that correct?

A. Yes, sir.

Q. Were these items then hand-delivered to Mr. Somerville?

A. I don't recall whether it was mailed or hand-delivered. I think it was probably sent by courier the afternoon of April the 10th.

Q. Was the check, thirty thousand dollar check, that is part of Defendant's Exhibit 4, negotiated?

A. I assume that it was. I have heard nothing to indicate that it was not.

Q. Is there a way you could verify that?

A. Yes, sir.

(p. 31) Q. Is it a good time—could you just make a quick phone call or have someone do that or whatever? I would like to have some verification that the check has been negotiated.

A. Could we take just a short break?

Q. Yes, sir.

(Short recess.)

Q. Would you like for us to come back to that, or did you get an answer?

A. I will have someone go to the accounting office and research it and attempt to locate that check.

Q. Okay, sir.

A. The only other fact that I would have at my disposal concerning the negotiation of the check in preparing or pulling together these documents for purposes of this subpoena, compared my correspondence file with that of Mr. Somerville two days ago.

And looking through his file, (p. 32) his file reflects a letter dated April the 12th, I believe, from Mr. Rutledge back to Mr. Somerville stating, as I recall, generally, that he had received the thirty thousand dollar check and the accompanying documents which Bill had sent to him, which will be the upcoming Exhibit 5, that he had deposited the check to his—or the firm's account, and that he had drawn a check to Justice Embry from—I believe he referred to their trustee account.

Q. Did he indicate the amount—

A. I did not receive a copy—

MS. OLNEY: I'm going to object to any further discussion about this letter without the production of the letter in the—

MR. NETTLES: Well, I would want to see the letter.

(Whereupon, a discussion was held off the record.)

(Whereupon, Defendant's Exhibit 11 was marked for identification by the (p. 33) Reporter.)

Q. I hand you an item marked now for identification as Defendant's Exhibit 11. Is that the document to which you had previously referred as your having seen in Mr. Somerville's file?

A. Yes, sir.

Q. And would you proceed again with your explanation as to Exhibit 11?

MS. OLNEY: I'm going to object to repeating what it was before, unless there's something new to add onto what it says. Otherwise, the document speaks for itself. He's already testified.

Q. Why don't you just read out loud this short document, the cover letter? Would you just read that?

MS. OLNEY: I'm going to object to that, too. I don't think we've been doing that with all of these, and it's attached as an exhibit.

Q. Make an exception. Is this the letter, Exhibit 11, then, written on the (p. 34) letterhead of Rutledge, Fay and Kelly, P.C., over the signature of W. Eugene Rutledge, signed Gene, addressed to Bill Somerville?

And does it read, "I am returning the signed stipulation of dismissal. Please have the order entered and send me a copy of everything," period, paragraph.

"I have deposited the thirty thousand dollar check and sent my trustee check to Judge Embry, along with the confidentiality agreement. He has agreed to execute the confidentiality agreement and return it to me on Monday. I will get it back to you then." Did I correctly read the letter?

A. Yes, sir.

MR. NETTLES: And under the situation, may I ask your counsel, if he would, is that the letter, Exhibit 11, Mr. Somerville, that you received from Mr. Rutledge?

(p. 35) MR. SOMERVILLE: That is a letter that I have in my file that was received from Mr. Rutledge.

MR. NETTLES: Does that appear to be Mr. Rutledge's signature, "Gene"?

MR. SOMERVILLE: So far as I can tell.

Q. And attached to that letter, Mr. Till, is there not a partially executed stipulation for dismissal bearing the signature of W. Eugene Rutledge?

A. Yes, sir.

Q. Does that particular copy also have the signature of Mr. Somerville?

A. Yes, sir.

Q. No date has been filled in in that; is that correct?

A. That's correct.

Q. Is this the same stipulation that was filed with the Circuit Court for the Tenth Judicial Circuit, Jefferson County, Alabama, on April 16, 1985?

A. Yes, sir, it appears to be the (p. 36) same.

Q. Only difference being that the date April 12 was filled in with the copy filed with the Court?

A. Yes, sir.

Q. And does the order that was signed by Judge Carl, dated April 16, appear to be the same—is it the same as the order of dismissal, the unsigned order of dismissal, which is also attached to Mr. Rutledge's letter of April 12, Exhibit 11?

A. Yes, sir, it appears to be the same.

Q. With respect to Defendant's Exhibit 5, is that a copy of Mr. Somerville's letter to Rutledge mentioning

that he was enclosing therewith the settlement check and stipulation and proposed order?

A. Yes, sir.

Q. And is it noted that you received a blind copy?

(p. 37) A. Yes, sir.

Q. And is this Exhibit 5 the blind copy you received of that letter?

A. Yes, sir.

Q. And the attachments to that letter, Defendant's Exhibit 5, are the same as the attachments to Mr. Rutledge's reply of April 12, Defendant's Exhibit 11, with the exception that the exhibits on 5 were unexecuted; is that correct?

A. The attachments to Defendant's Exhibit 5 appear to be the same stipulation for dismissal document and order of dismissal document as that attached to Defendant's Exhibit 11.

In addition to Defendant's Exhibit 5, there's also a copy, unsigned, of the proposed confidentiality agreement between the parties and their counsel.

Q. Would you look at Defendant's Exhibit 6 and tell me what that is?

A. Exhibit 6 is a letter dated April 19th, 1985, from —this is a file (p. 38) copy, an unsigned file copy, of a letter which would have been sent by Dick Jones, vice-president of sales, for Blue Cross, addressed to Dr. William C. Walsh, deputy secretary and treasurer, Retirement Systems of Alabama, in Montgomery.

Q. What about Exhibit 7?

A. Exhibit 7, the letter dated April 29th, 1985, addressed to Mr. Somerville from myself, enclosing and transmitting to Mr. Somerville two executed copies of the confidentiality agreement with regard to the Embry litigation.

Q. And Exhibit 8?

A. Exhibit 8 is an original, fully executed copy of a confidentiality agreement executed between Eric Embry, with Eugene Rutledge, myself, and William G. Somerville Jr., as a confidentiality agreement earlier discussed.

This Exhibit 8 was the retained file copy which I retained in my file following execution by all the parties.

(p. 39) Q. I ask you now whether you have been able to obtain a copy of the negotiated check endorsed by Mr. Rutledge's law firm?

A. Yes, sir.

Q. Would you compare that copy with the previous exhibit which you have identified, the check which accompanied the Exhibit Number 4?

First, let me have this marked for identification as a further exhibit to this deposition, Exhibit 12.

(Whereupon, Defendant's Exhibit 12 was marked for identification by the Reporter.)

To rephrase my question, would you tell us what Exhibit 12 is?

A. Exhibit 12 is a microfilm copy which was obtained from the records of the Blue Cross accounting department, copy of a check drawn on the account of Blue Cross/Blue Shield of Alabama, payable to Rutledge, Fay

and Kelly, P.C., in the (p. 40) amount of thirty thousand dollars. The date of the check is April the 10th, 1985.

Q. And does the reverse side of that exhibit indicate an endorsement?

A. That's a stamped endorsement indicating it was for deposit only, Rutledge, Fay and Kelly, P.C., trustee account and the account number.

Q. And does there appear to be a bank stamp of April 15, 1985, also on the back portion of the check?

A. Yes. The copy is not very clear, but it would appear to be—

Q. AP '85, 15?

A. Yes, sir.

Q. Now, I ask you to compare your exhibit, Exhibit 12, to the draft that was attached to Exhibit 4. Is not—are not those two exhibits the same thing?

A. Yes, sir.

Q. Or evidence of the same draft; is that correct?

A. Yes, sir, they are.

(p. 41) Q. Representing the thirty thousand dollar monetary portion of the settlement?

A. Yes, sir.

Q. Mr. Till, do you know of any other agreements, letters, memoranda, notes, or other writings in your possession or control or Blue Cross's possession or control evidencing or pertaining to any of the terms or conditions of the settlement or dismissal of Embry versus Blue Cross and Blue Shield?

A. No, sir.

Q. Incidentally, what is the correct corporate name of Blue Cross/Blue Shield?

A. It's Blue Cross and Blue Shield of Alabama.

Q. Has an "and" rather than a slash?

A. Yes, sir.

MS. OLNEY: Is there an Inc.?

THE WITNESS: No.

Q. Was there any other written (p. 42) release or documents executed in addition to the stipulation of dismissal?

A. No.

Q. Is it correct that Justice Embry's deposition that was commenced at approximately ten o'clock on January 10, 1985, and recessed at approximately five o'clock that afternoon ever [sic] recommenced?

A. No, sir. No date was ever set.

Q. Or was there a date ever set for proceeding further with that deposition or concluding the deposition?

A. I believe the date of January 11th may have been set to continue the deposition. But I do not — I'm certain that the deposition did not in fact continue.

There may have been — these were discussions between counsel. I'm not sure. There may have been a subsquent date proposed or tentatively established. I don't recall.

Q. Is it correct that you have (p. 43) testified earlier that settlement negotiations or proposals were initiated

following the recess on January 10 of Justice Embry's deposition?

A. At some time subsequent to that, yes, sir.

Q. And those were initiated by plaintiff's counsel; is that correct?

A. To the best of my understanding, yes, sir.

MR. NETTLES: That's all I have at this point.

EXAMINATION BY MS. OLNEY:

Q. Mr. Till, isn't it true that the confidentiality agreement reflected in Defendant's Exhibit 8 was the suggestion and idea of Blue Cross/Blue Shield and not Justice Embry?

A. I believe it was. The suggestion of the Blue Cross counsel, yes.

Q. Justice Embry or his counsel never asked you initially to keep this (p. 44) confidential for any reason peculiar to Justice Embry, did they?

A. To the best of my recollection, counsel for Blue Cross included a proposed confidentiality understanding as a part of the settlement offer.

Now, as I recall, or as I understand, there were discussions back and forth between counsel concerning all of this. I don't know to what extent there may have been some interest on their part expressed as well.

Q. Isn't it correct that Defendant's Exhibit 1, Mr. Somerville's letter of March 26th to Gene Rutledge, Justice Embry's attorney, states, "I neglected to mention in our conversation, however, that this offer of payment of

twenty thousand dollars towards your attorneys' fees is conditioned upon the agreement by you and Justice Embry that it not be disclosed to any other persons," isn't that correct?

(p 45) A. Yes, ma'am.

Q. And that was part of the initial proposal of any monetary sum?

A. Yes, ma'am.

Q. We've mentioned that Justice Embry's deposition had been taken at the time the settlement discussions first initiated. What other depositions had been taken at that time?

A. A part of Justice Embry's deposition.

Q. Thank you.

A. It had been commenced. It had not been concluded.

Q. Part of his had been taken. Had any other depositions been taken in whole or in part?

A. As I recall, the deposition of Gene Thrasher —

Q. If you would identify who he is, what his position is, what company.

A. Mr. Thrasher is vice-president of the marketing group of Blue Cross/Blue (p. 46) Shield of Alabama.

And his deposition had been taken, as I recall, sometime the latter part of 1984. I don't recall the exact date.

Q. Do you know if it was completed?

A. Yes, it was.

Q. Anybody else that had been deposed?

A. Not that I recall.

Q. Okay. Were any depositions scheduled for the upcoming months at the time Justice Embry's deposition was taken?

A. Not that I recall.

Q. Okay. What about production of documents? Had any documents been produced by Blue Cross to Justice Embry's attorneys at this time?

A. Yes, ma'am.

Q. Were there any requests for production of documents, either outstanding or in a position where there might be some disagreement between Blue Cross and Justice (p. 47) Embry's attorneys over whether or not a complete production had been made?

A. As of what time?

Q. At the time Justice Embry's deposition was initially taken?

MR. SOMERVILLE: Do you have a case docket sheet that might help him refresh his recollection on that? It's very difficult to remember.

A. At that point in time, I can look at the docket and see. I really don't recall whether there were any pending discovery matters or not.

(Whereupon, a discussion was held off the record.)

Q. Now, you've said that, as best you recall —

A. Excuse me. At the time of Judge Embry's deposition, there were, as I recall, pending document requests that we had of Mr. Rutledge concerning some aspect or

Judge Embry's tax returns that had not been satisfied, as I recall, as of the (p. 48) taking of his — the partial taking of his deposition.

I recall that as having been the case. I don't know — I frankly don't recall whether there were any other similar kinds of things or not.

Q. Isn't that referred to in his deposition, some discussion about some additional documents that would be produced pertaining to tax returns?

A. I believe it was.

Q. What about in the time period between the deposition which was not completed and the actual settlement? Did you receive any more document production requests that you recall during that time?

A. Not that I recall.

Q. I believe you testified that, as best you recall now, his initial offer was a hundred thousand dollars, is that correct, plus some sort of agreement and statement of a type similar to what was ultimately embodied in the stipulation for (p. 49) dismissal?

A. My recollection is a hundred thousand is the first finite amount of the money, financial amount, that I recall having heard discussed in the matter as having been offered by Mr. Rutledge.

Let me add, as I recall, there was, in the earlier part of discussions, some general discussion coming from Mr. Rutledge that they were seeking some sort of relief on the part of the class.

And I believe that included — as they were proposing, that it might take the form of some type of financial relief. But I don't recall that amount ever having been specified.

It was, in effect — as I would characterize it, the idea was being explored by Mr. Rutledge, and we would not consider it. We were not interested in pursuing that sort of relief.

Q. And it's also true that, between January and the first proposal of any (p. 50) financial sum and April of that same year when a final sum was reached, that through negotiations, you were able to reduce the figure and settlement from a hundred thousand dollars initially suggested to thirty thousand dollars; is that correct?

A. Yes, ma'am.

Q. This agreement was reached shortly before any action was to be taken on the certification issue; isn't that right?

A. As I recall, a hearing by Judge Carl had been set, and it may have been postponed a time or two, for the class certification.

As I recall further, that class certification hearing had been — was then, about the time of the settlement, postponed indefinitely, and the hearing which had earlier been set for class certification in effect was converted to a hearing to determine Judge Carl's qualifications to try the case as a member of the purported (p. 51) class himself.

Q. Would it be correct that, if Judge Carl was a member of the purported class by virtue of being a state

employee, that all circuit judges in the state of Alabama would be as well?

A. Yes. That would be our position.

Q. And that would also be true for judges sitting in other courts, lower courts and higher courts in the state of Alabama, isn't that correct?

A. Yes, if they were all members of that state employees insurance plan. And, so far as we know, the vast majority, if in fact not all — I don't know that all judges are actually enrolled in that program. But it is our assumption that virtually all of them are.

Q. Would it be a fair statement that, if Judge Carl had decided that he was disqualified, it was going to be extremely difficult to find some judge in Alabama who (p. 52) was not disqualified?

A. Yes.

Q. Do you know how many attorneys or other legal support personnel Blue Cross had working on this particular lawsuit, just internally Blue Cross, as opposed to Mr. Somerville's law firm?

A. Pamela Blaylock, an associate counsel in the legal department, worked on this litigation in large part, in addition to myself.

I have a second associate counsel. Alan Dane, I believe, also worked on it to a lesser extent. Your question is confined to internal; is that correct?

Q. Yes.

MR. SOMERVILLE: Excuse me. You asked about support personnel. Do you mean legal support personnel?

Q. Yes. My next question was paralegals and people of that type, as opposed to strictly clerical assistants?

A. At that time, we did not have a (p. 53) paralegal position, so there would have been no one in a paralegal capacity —

Q. Okay.

A. — that would have worked on it.

Q. So it would have been you and Ms. Blaylock working primarily from an internal standpoint for Blue Cross and another gentleman who is associate counsel within Blue Cross also putting in some time; is that correct?

MR. SOMERVILLE: Is this limited to legal counsel as opposed to other administrative staff?

MS. OLNEY: Yes.

A. That is correct.

Q. Do you know how many attorneys were actively involved in this lawsuit from Mr. Somerville's law firm?

A. I know of at least three attorneys at Lange-Simpson that would have been actively involved.

And I believe there were others that may have been involved as well, but (p. 54) I'm not certain of who nor how many.

Q. Would it be a fair statement that, between the people in your office and the people in Mr. Somerville's office, that you were examining the contentions in this complaint very carefully and examining the potential liability very closely in making any decision on this lawsuit?

A. Yes.

Q. Okay. Do you recall what Blue Cross/Blue Shield's expenses were in this litigation at the time of settlement? And by that, I'm referring to expenses of the legal department here and expenses of Mr. Somerville's firm exclusive of attorneys' fees.

I'm not interested in knowing what the attorneys' fees were, strictly the expenses paid.

A. No, I'm not.

Q. Can you give your best estimate of what the total expenses were or what your internal expenses were?

(p. 55) A. I would not have a—without giving some time and thought and calculation, I would not even hazard a guess.

I could say they were extensive in terms of time, resources, printing, the time of additional people involved in pulling together files, computer runs, things of that nature.

It would have been a considerable amount. But I don't have any figure.

Q. What about out-of-pocket expenses? Do you know how they ran? Were they minimal or substantial or quite substantial? Can you give us your best estimate of those?

A. I would consider they would have been substantial in terms of the types of items I just enumerated, manpower and just sheer hours of time spent by legal personnel as well as other support and managerial people to discovery and other (p. 56) aspects of the case.

Q. Do you have any idea what kind of expenses Justice Embry's law firm had incurred at the time the suit was settled?

A. No, not in terms of dollar amount, no.

Q. Do you have any knowledge of what the ultimate agreement was between Justice Embry and Mr. Rutledge and members of his firm as far as payment of out-of-pocket expenses or attorneys' fees were concerned?

A. No, I do not.

Q. It's correct, isn't it, that one of the terms of the settlement and the stipulation for dismissal was that each party was to bear its own cost? Isn't that correct?

A. Yes.

Q. So any cost incurred by Justice Embry or the law firm representing him would have come out of this thirty thousand dollars that was paid, is that right?

(p. 57) A. I don't know.

Q. Okay. Nothing was paid over and beyond that as far as taxable cost in the court by Blue Cross?

A. No.

Q. Mr. Till, you didn't pay this thirty thousand dollars to Mr. Rutledge's firm and Justice Embry simply because he was a supreme court justice, did you?

A. No.

Q. Would it be a fair statement that one of the reasons for your paying this particular sum is that you felt that there was some possible liability in this case and, consequently, settlement was appropriate?

MR. SOMERVILLE: Are you speaking of liability on the merits of the case?

MS. OLNEY: Yes.

A. Of course, any time there's litigation pending, there's always some possibility of liability, remote though it may be.

(p. 58) In our consideration of settlement, we were principally concerned and to a large portion of that to the economic costs to this organization in terms of managing, directing what could be a large and very complex class action case.

Our concerns were largely economic in terms of the sheer impact on people, resources, legal fees, the time required to look backwards in time at hundreds of thousands of claims, perhaps as opposed to, you know, moving forward with getting our current work done and preparing for future matters.

So it was in a—I don't recall that we had any particularized concern about adverse liability on the merits of the case.

Q. Well, Blue Cross doesn't make a habit of paying settlement on claims that are wholly without merit, does it?

A. Could you define what type of (p. 59) claims?

Q. Litigation. Simply because somebody files a lawsuit, Blue Cross doesn't go ahead and pay them a cost of defense type of settlement sum just to get rid of it even if they feel the claim is wholly without merit, is that correct?

A. Well, the costs, expected costs of defense, the difficulty of pulling people and facts and that sort of thing together are assessed at some point in time.

Q. That's always a factor in any lawsuit, isn't it?

A. I was saying that the time and effort and resources that would be required to defend any lawsuit would normally be considered at some point in time, as a matter of course.

Q. Okay. And I believe I then said, that's a consideration in any lawsuit. And I think you said, yes, that's correct?

(p. 60) A. It would normally be, yes.

Q. Would it be a fair statement that, where Blue Cross feels that a lawsuit filed is truly without merit, that, as a matter of principle, the suit will be defended to its ultimate end, anyway, and sums won't be paid just to get rid of it? Isn't that correct?

A. I don't think I could say that as an absolute rule in every case. There have been other cases — I'm speaking generally, now — where we may have felt there was no merit to the case but, because of opportunity to get out on a purely economic basis that we considered favorable or extremely favorable to this organization, we may from time to time take that course even though the underlying case, in our opinion, may be entirely without merit.

Q. Basically, if I understand what you're saying, every lawsuit has a certain nuisance value and you have to consider (p. 61) paying that before getting into it, isn't that correct?

A. Every lawsuit is a nuisance to some extent, certainly. I think it would be considered, at least to some degree, in most of them.

Q. Well, do you consider a thirty thousand dollar payment truly a categorizing a case as paying a nuisance value? And isn't that going a little beyond strictly a nuisance settlement?

MR. NETTLES: Do you mean before or after the bad faith decisions and the —

MS. OLNEY: The question as asked.

A. In terms of the expected complexity of the Embry litigation, the sheer magnitude, potential magnitude and impact upon the operations, manpower, legal expenses and that sort, we felt that the settlement arrangement which was ultimately concluded was very much to our advantage.

(p. 62) I would not — in terms of nuisance, it was certainly more than the routine type of case. But it was much more so in terms of the complexity of the matters involved and the amount of time which would have been required for it.

Q. Would it be correct that, had this lawsuit continued, it would have involved outside parties coming in and conducting an extensive investigation of Blue Cross's internal practices and procedures in handling of claims?

MR. NETTLES: We object to speculative.

A. By outside parties, do you mean the Court?

Q. Justice Embry's attorneys, basically, is what I was referring to.

A. That would have been a part of it.

Q. Okay. That's something that you anticipated happening?

A. Yes, ma'am.

(p. 63) Q. And that was foreclosed by coming to a settlement at this time, is that correct?

A. Yes, ma'am.

Q. Mr. Till, I would ask you to look at Defendant's Exhibit 1 which, as I understand it, has the stipulation for dismissal originally proposed, and compare that to the stipulation for dismissal that was in fact signed and filed in court.

And I believe an unsigned copy of that appears at least as an attachment to Defendant's Exhibit 6, isn't that correct?

A. Yes.

Q. I believe the correspondence had indicated that the original stipulation for dismissal attached to Exhibit 1 was originally drafted by Blue Cross/Blue Shield, is that right?

A. Yes.

Q. And then Justice Embry's attorneys suggested that there were some (p. 64) changes or additions that had to be made before it would be satisfactory to them; is that correct?

A. As I recall, yes, ma'am.

Q. I would like for you to compare with me — I just want to be clear on what were the additional comments

or changes made to these documents that would appear to have been suggested by Justice Embry's attorneys.

So if you compare these documents with me and if you would point out in the opening paragraph, the unnumbered paragraph, of the stipulation for dismissal, are there any changes that you see there between the original proposed document and the final document as agreed to?

A. I do not see any changes.

Q. What about paragraph one?

A. I believe the only difference would be that, in the document attached to Defendant's Exhibit 6 —

(p. 65) Q. That's the final document?

A. I believe it to be a copy of the final document. There was a sentence added at the end of paragraph one in the document attached to Exhibit 6 that does not appear in the original proposed document.

Q. The original document referred to the object of the institution of the suit by Justice Embry and that it was to emphasize the importance to individual members of the plan that claims under the plan be processed and determined by Blue Cross in a timely and efficient manner, isn't that correct?

A. Yes.

Q. Would you read the sentence that was added and agreed to in the final document?

A. "Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future."

Q. Is that recognition — is that something that came about from the handling (p. 66) of this litigation by Justice Embry?

A. No.

Q. Were you aware that there were problems that had occurred in the past?

A. Yes, ma'am.

Q. Prior to this? Your determination to minimize them in the future — do you — were you in agreement with that as a part of the settlement of this lawsuit, that you would minimize these problems?

A. Well, it is our continuing effort to minimize any sort of problems that our customers have, regardless — and that would be the case regardless of this litigation.

Q. Okay. What about paragraph two? Is there any variation between the two documents there?

A. I believe there's a slight variation, and I think it was simply in the the — just a minor editorial change in the third line of paragraph two.

(p. 67) Q. Okay. The final version reads, "The institution and prosecution of the suit by the Plaintiff have resulted in Blue Cross's increased awareness of the need for an intensifying commitment to exert efforts toward timely and efficient processing of claims." Have I read that correctly?

A. Yes.

Q. What about paragraph three?

A. I believe that the only change in paragraph three is the addition of the last sentence.

Q. Would you read that for us?

A. Which reads, "Blue Cross will intensify efforts in the future in this regard."

Q. And what regard is that referring to?

A. To process diligently the payable claims of covered members in accordance with the terms of the plan, including the, quote, "performance standard for the administrator," end quotes, (p. 68) "contained in the administrative services agreement between Blue Cross and the Alabama State Employees Insurance Board."

Q. Okay. What about paragraph four? Are there any changes in that paragraph?

A. I do not recall, and I do not notice any at this time.

Q. Okay. What about paragraph five?

A. I do not recall there being any changes to five.

Q. Okay. What about the paragraph that begins, "wherefore"?

A. I believe there was an insertion.

Q. Would you read that insertion for us, please?

A. The insertion being, "the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above," comma, "therefore . . ."

Q. Were there any changes in the (p. 69) order of dismissal between the original proposal and the order

ultimately signed by the circuit judge, other than the dates, obviously?

A. I do not believe there is.

Q. When Blue Cross/Blue Shield, through its representatives, signed this stipulation for dismissal, was it in fact their commitment at the time to live up to the terms of this agreement?

A. Yes.

Q. Has Blue Cross/Blue Shield made any changes or improvements in any of its procedures or handling of matters since the time this agreement was entered into?

A. In what regard, ma'am?

Q. What attempts have been made, either since the actual signing of the agreement or since the terms of the agreement were reached, to ensure that Blue Cross/Blue Shield is in compliance with this agreement?

A. Well, as I mentioned earlier, (p. 70) Blue Cross has a continuing commitment to improvement of the expeditious handling and processing of its claims in a timely and efficient manner.

We had — initiatives of that nature are underway and ongoing at all times.

Q. Were there any that —

A. If I might generalize, additional staff would be added from time to time in various areas that would have a positive reflection on capacity to service the membership claims and inquiries, telephone, that sort of thing.

There's an ongoing effort, has been, in the — in our claims area, to consolidate — from the previous subdivi-

sion and organization of the claims department, to achieve consolidation of various functions which had previously been separated that — the idea being to consolidate and retrain, change the process and flows to, in effect, process claims (p. 71) quicker with less need for a claim having to be routed to previous different sections for handling, which could slow it up.

But, now, those initiatives were not undertaken precisely as a result of this lawsuit nor precisely as a result of this stipulation.

They were — there were initiatives of that matter underway at the time. And at any point in time, that would be the case.

Q. Were the terms of this stipulation for dismissal that Blue Cross had signed onto and is now record in Jefferson County, were these disseminated to the key personnel who would be implementing these programs to make them aware of the commitment that had been made as part of the settlement of this lawsuit?

A. I believe they were discussed generally with various personnel internally. I don't recall whether they were ever actually copied and distributed (p. 72) or not.

Q. What I'm trying to get at is, would it be a fair statement that, this stipulation for dismissal having been entered into and made public record in Birmingham, wherever in Jefferson County, that this stipulation then just didn't enter your file and Blue Cross/Blue Shield forget about it and go about whatever they had been doing; but, instead, some sincere efforts were made to comply with

the commitments made in this stipulation, isn't that correct?

A. Yes. Sincere efforts were already underway. And, as I say, that is an ongoing effort in, I guess, all of our operations, to continually look for ways to improve whatever function is being evaluated to cause things to happen more quickly, more completely, more expeditiously and more economically.

Q. Well, let me ask you this. For example, in paragraph three — and I (p. 73) realize that you've obviously made a sincere effort in the past to correct problems.

It appears, however, that there were some problems that were not being corrected and that some additional effort was needed.

And there's a commitment in here that Blue Cross will intensify efforts in the future in regard to one of the problems that had been addressed in this lawsuit.

Is it correct that Blue Cross, since that time, has intensified their efforts as the commitment made here said they would?

A. Yes, I would think there has been.

Q. There's a recognition in paragraph four that there may be a need to obtain information from sources other than claim forms.

Apparently, that had been a problem addressed in this litigation. And (p. 74) there is a commitment by Blue Cross that it will undertake reasonable efforts to locate certain information from its own internal sources before seeking it from external sources.

Has some change been made there since this lawsuit to comply with this commitment?

A. It's my general understanding that some additional efforts are being made in addition to efforts that had — previously were made of that nature to obtain, if it was reasonably available, information internally before we would go externally.

This is not a new process that was implemented as a result of this litigation generally or agreement. We already did that and do that as matter of course in many instances.

And I think it becomes a question of degree in terms of how far do you look internally before you route it (p. 75) back to either the provider or subscriber for additional information.

Now, that's — and I've never been the manager of a claims processing area. But, as I understand it, generally, that's a difficult balancing act that has to be followed, where you may have hundreds of documents pending, waiting for additional research, versus waiting for call backs to providers or the subscribers themselves, if you can reach them, for that information versus mailing it back and asking them for that information.

That's a constant, ongoing problem, if you will, in administering a complex health benefit plan, is getting the information that you need.

And if no judgments are made from time to time in terms of what is the best way to handle -- how far do you go looking internally and how much resources do you put there, which may also be delaying the claim, as opposed

to sending (p. 76) it out — as opposed to getting the information or sending it back externally for the information.

Q. Isn't it correct that one of the problems that Justice Embry and his attorney saw in the operation and that they were complaining about in this litigation was that individuals such as Judge Embry were asked to provide information and would give this information to Blue Cross and it would go into one file and then the information would be needed in another file and be requested again, perhaps more than twice, from individuals when it had already been given to someone at Blue Cross?

Isn't that one of the things they had complained about, repeated requests for information which had already been provided into the mass of documents somewhere?

A. I think that was probably a correct assessment of their perception. I don't think I would agree, from my (p. 77) recollection of the facts, that that occurred on any specific claim.

Q. Okay. Obviously, you have a different view of how the situation operates than the plaintiffs did in the case?

A. Yes, ma'am.

Q. Do you feel that, because of their contention along those lines, that Blue Cross is now aware of at least a perceived problem on the part of your customers, or however you refer to them in this regard, that you may not have appreciated before?

A. I would disagree that we are aware of it because of their contention.

Q. Are you aware of it from some other source?

A. Yes.

Q. And is that one of the areas that you have made a commitment that you are going to try to avoid this in this future?

(p. 78) A. We were aware before this litigation that customers, to some extent, had that perception, that it was causing some problems in customer relations of the general type, later evidenced by Judge Embry's lawsuit, and had already commenced the resolution or attempted resolution of that.

Let me point out that, in this business, I think that's a goal and objective. I don't think you ever fully get there.

But it is, as I indicated earlier, a continuing effort to avoid that whenever reasonably possible and still apply the appropriate scrutiny that is required of the claims under the contracts to which we're a party.

Q. So this would be one example of a complaint that he was making that had been made by other people and that you were already aware of, is that right?

A. Yes.

(p. 79) Q. Mr. Nettles asked you some questions earlier in which he inquired if this was a sensitive lawsuit and in other instances characterized it as a sensitive lawsuit.

I believe you agreed that it was one that you considered sensitive, is that correct?

A. Yes.

Q. Do you feel that the sensitive nature of this lawsuit came from the fact that the plaintiff and person attempting to represent the class was a supreme court justice? Was that the reason for the sensitivity?

A. I think that was part of it. A part of the sensitivity was that it was a class action involving all of the state employees, which incorporated, as far as we were concerned by definition and caused a very serious and a very sensitive issue involving the qualification of, so far as we know, all of the active trial judges in (p. 80) Alabama.

Q. Is the state account a large portion of your business, a significant client?

A. It is a large group account, yes.

MR. NETTLES: Let me interrupt just one moment.

(Whereupon, a discussion was held off the record.)

Q. Would it be correct that it was Blue Cross's understanding during the handling of this lawsuit that Justice Embry — that if this particular lawsuit ever did go to the Alabama Supreme Court, at a very minimum, Justice Embry would be recused from sitting on that court? Is that correct?

A. I'm sorry?

Q. Let me rephrase the question. Is it correct that it would have been Blue Cross's understanding from the — from when this lawsuit first got started, that if (p. 81) settlement was not reached and the case were tried and was ultimately appealed by any party dissatisfied with it, that one thing that you could count on as a minimum, Justice

Embry would not be sitting on the Alabama Supreme Court that would hear this lawsuit? Isn't that correct?

A. We had no understanding of that nature. That would be our presumption.

Q. Okay.

A. But —

Q. That he would be recused as a matter of law in a case of this type, in your appeal?

A. It would be our opinion that he should have been. But we had no understanding or assurance that that would have in fact occurred.

Q. And by the time you reached this settlement and even first started talking settlement, isn't it correct that that is in fact what had happened in the Granger versus Blue Cross case?

(p. 82) Isn't that the style of the case that came out in December?

A. At what point, now — at the time the case came out in December —

Q. Okay. By the time you started talking settlement in this litigation, you already knew that Justice Embry had recused himself in an earlier Blue Cross case?

A. Yes.

Q. So was it the understanding of Blue Cross that, whatever happened in this lawsuit, they really didn't expect Justice Embry to also be trying the case ultimately, himself, as a supreme court justice?

A. No, we did not —

Q. Okay.

A. — expect that to be the case.

MS. OLNEY: Okay. I believe that's all I have.

MR. NETTLES: Three quick questions.

(p. 83) EXAMINATION BY MR. NETTLES:

Q. Do you know of anything else in Mr. Somerville's file relative to Mr. Rutledge's payment to Justice Embry?

A. No.

Q. Do you know of anything pertaining — anything else other than the Exhibit 11 relative to the payment by Mr. Rutledge to Justice Embry?

A. No.

Q. Is it not correct that, other than Justice Embry, no member of the proposed class received any monetary relief from this Blue Cross settlement?

A. We have no knowledge of any other member receiving anything.

Q. That initial proposal of Mr. Rutledge to include monetary relief for members of the class generally was immediately rejected by Blue Cross, I believe you testified, is that correct?

A. Yes, that's right.

Q. Finally, is it not correct that, (p. 84) in your opinion, that the decisions of the Alabama Supreme Court in Aetna versus Lavoie, L-a-v-o-i-e, and Nationwide versus Clay substantially increased the danger of bad faith claims to insurance companies operating in Alabama?

A. I would agree generally that that could be the case from one or both of those opinions.

MR. NETTLES: That's all I have.

EXAMINATION BY MS. OLNEY:

Q. Mr. Till, do you believe that the case of Aetna versus Lavoie, the decision in that case, and the decision in Nationwide versus Clay significantly changed the law of bad faith as set out by the Alabama Supreme Court prior to this time?

MR. NETTLES: I would join in that question.

A. I think those two cases expanded or at least potentially expanded the reach (p. 85) of the tort of bad faith to fact situations which, under the expressed rule of law pronounced by the Alabama Supreme Court, would not actually amount to a bad faith case.

Q. So your job is defending Blue Cross, right?

A. Yes.

Q. And you think that these affirmants of plaintiff verdicts are stretching the factual situation; is that correct?

A. I don't know whether the facts were stretched or not.

Q. Stretching the factual context of a bad faith case?

A. As I understand the rule of law that has been established by the Alabama Supreme Court, I do not believe that the facts in either of those two cases would have amounted to a bad faith cause of action under the — applying the rule of law which I understand them to have earlier (p. 86) said was the case.

Now, I said I think those two cases, I believe, further expanded, in effect, or further confused the situation.

I, frankly — in looking at earlier cases, offhand, I don't recall an earlier fact situation, looking at it in its entirety, where they followed the rule of law.

Q. All right.

A. I think, in every case of which I recall, there had been some arguable factual or legally debatable reason that would have justified either some delay or denial, in whole or in part, at least, of the issue.

Q. So you don't think that any of the cases where the supreme court has allowed some sort of damages for bad faith to stand up that there was in fact any bad faith as defined by the Alabama Supreme Court on the part of the insurance company involved?

(p. 87) A. Well, I can't say whether or not there was in fact or not bad faith on the part of the company.

All I'm trying to say is applying the rule of law itself and looking to whether or not there is an arguably debatable fact or legal issue, one or both, I believe there was evidence of an arguable, either factual or legal or both, type of issue in all of those cases.

Q. Okay. All of the Alabama Supreme Court bad faith cases which you—

A. All that I recall, yes, ma'am.

Q. Do you feel that the Aetna versus Lavoie and Nationwide versus Clay decisions rewrote the rule of law regarding bad faith, if you're even in a position to say?

You may not have studied this context. And if you feel that way, that's fine.

MR. NETTLES: Go ahead and answer.

(p. 88) A. I think the Court further expanded upon, in effect, and drafted perhaps additional types of factual situations as constituting a type of bad faith that, again, does not seem to fit with their pronounced rule of law on the subject.

Q. Okay. Have you discussed this area of law with Mr. Nettles prior to the commencement of this deposition today?

MR. SOMERVILLE: Bad faith cases?

MS. OLNEY: Yes. Or any of these cases—

A. In a very general sort of way. We did not discuss, as I recall, the precise cases, that I recall.

Q. Have you attended any seminars or—put on in the past two years regarding—that covered as a topic bad faith litigation in Alabama?

A. I don't believe I have attended a seminar in Alabama covering Alabama, Alabama's version of bad faith, no.

(p. 89) Q. What about in other states?

A. I attended a seminar in, I believe, June of 1984, in San Francisco, California, which had as a segment a discussion dealing generally with the bad faith type of case and punitive damages, which was part of a—what's referred to as a national Blue Cross and Blue Shield Association Lawyers Workshop, which is usually held annually, which my counterparts would generally attend on a variety of legal issues—

Q. This was put on by Blue Cross/Blue Shield?

A. Yes.

Q. And it is strictly Blue Cross/Blue Shield attorneys that are attending this?

A. Yes.

MS. OLNEY: I think that's all I have.

MR. NETTLES: That's all I have.

(p. 90) CERTIFICATE

STATE OF ALABAM.)
JEFFERSON COUNTY)

I, Donna Mims Williams, hereby certify that the above and foregoing deposition was taken down by me on Computerized Stenotype, and the questions and answers thereto were transcribed by me, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel, nor of kin to the parties in the action, nor am I in anywise interested in the result of said cause.

/s/ Donna M. Williams
Commissioner

DEFENDANT'S EXHIBIT 1

Law Offices

LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Building
Birmingham, Alabama 35203

Telephone 252-7000 Area Code 205

March 26, 1985

W. Eugene Rutledge, Esq.
1300 Brown Marx Tower
Birmingham, Alabama 35203

Re: T. Eric Embry v. Blue Cross/Blue Shield
Civil Action No.: CV 84-500-447 JDC

Dear Gene:

In accordance with our telephone conversation this afternoon, I am enclosing copies of a proposed Stipulation for Dismissal and an Order of Dismissal for this case.

In addition, as discussed in our telephone conversation, we also would pay $20,000 to you as part of your attorneys' fees in this case. I neglected to mention in our conversation, however, that this offer of payment of $20,000 toward your attorneys' fee is conditioned upon the agreement by you and Judge Embry that it not be disclosed to any other persons.

We look forward to hearing from you after you have had an opportunity to discuss this with Judge Embry.

With best regards, I am

Very truly yours,

LANGE, SIMPSON, ROBINSON
& SOMERVILLE

/s/ William G. Somerville, Jr.

WGSjr/ser
Enclosure

cc: Henry E. Simpson, Esq.

bcc: Mr. Grey Till, Jr.
Ms. Pamela C. Blalock

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NUMBER:
CV-84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

STIPULATION FOR DISMISAL

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a)(1) of the Alabama Rules of Civil Procedure, hereby stipulate that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness

of the important need, and its intensified commitment to exert its efforts, for the timely and efficient processing of such claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims, Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, in accordance with and pursuant to the foregoing, each party, as evidenced by the signatures below of their respective counsel of record, stipulates and

agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the — day of March, 1985.

T. ERIC EMBRY

BY: W. EUGENE RUTLEDGE
As His Attorney

BLUE CROSS AND BLUE SHIELD
OF ALABAMA

By _____
As Its Attorney

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NUMBER:
CV-84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated March —, 1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and accordingly that this action be, and the same is hereby, dismissed with prejudice, with the parties to bear their own costs.

DONE and ordered this the — day of March, 1985.

_____

CIRCUIT JUDGE

DEFENDANT'S EXHIBIT 2

Law Offices
LANGE, SIMPSON, ROBINSON & SOMERVILLE

Ormond Somerville
White E. Gibson, Jr.
Robert McD. Smith
Allen D. Rushton
James E. Simpson
James L. Clark
Henry E. Simpson
William G. Somerville, Jr.
John E. Grenier
Lawrence B. Clark
Joseph W. Mathews, Jr.
Harry L. Hopkins
John B. Tally, Jr.
Lewis W. Page, Jr.
Richard P. Carmody
Charles C. Pinckney
Robert D. Hunter
L. Burton Barnes, III
Atley A. Kitchings, Jr.
Peyton Lacy, Jr.
Stephen A. Rowe
M. Ann Huckstep

1700 First Alabama Bank Building
Birmingham, Alabama
35203

———

Telephone
(205)
250-5000
Telecopy
(205)
250-5034

Robert D. Eckinger
John W. Gant, Jr.
Craig A. Alexander
James N. Nolan
Lynn Baxley Ault
Janet W. Taylor
Paul E. Toppins
Fred J. McCallum, Jr.
Augusta S. Dowd
Johnnie Frank Vann
Sally Sharp Reilly
Thomas S. Woodroof, Jr.
Gail M. Pugh
Barbara F. Olschner

Ray L. Lange
(1887-1966)
James A. Simpson
(1890-1973)
Memory L. Robinson
(1901-1962)
Reid B. Barnes
(1903-1984)

April 5, 1985

Mr. A. Grey Till, Jr.
Vice President & General Counsel
Blue Cross and Blue Shield of Alabama
450 Riverchase Parkway East
Post Office Box 995
Birmingham, Alabama 35298

Re: Embry, et al v. Blue Cross Blue Shield of Alabama

Civil Action No.: CV 84-500-447-JDC

Dear Grey:

As communicated earlier this week, we received on Saturday, March 30, a notice from Judge Carl that this case was set for hearing on class certification next Thursday, April 11. Also, as we previously had discussed, Henry

contacted Judge Carl for a meeting concerning his disqualification because of his interest in the suit as a member of the state employee group covered by the health benefit plan involved in the suit.

Yesterday, April 4, Gene Rutledge and another lawyer from his office, together with Henry and I, met with Judge Carl at 12:00 noon. After some bit of discussion, Judge Carl concluded that he would postpone the class certification hearing and would use the setting at 9:00 a.m. on Thursday, April 11 as a time for argument of the disqualification issue. He requested that briefs be submitted to him in advance of that time.

In other developments in connection with this case, I have discussed with Gene Rutledge on April 3 the position of Blue Cross on settlement along the lines which Bill Mandy, Gene Thrasher, you, and I had discussed on Tuesday afternoon. I told him then that the absolute maximum and final proposal that Blue Cross would offer was $30,000 toward payment of Rutledge's attorney's fee in handling the case for Judge Embry. At about 8:30 on the morning of April 4, Rutledge called back. He said that he had been to see Embry the previous night and that he had been able to get Embry to agree to accept $50,000 for settlement of the case, with waiver by Rutledge of his attorney's fee. Rutledge indicated also that some changes would need to be made in the language of the stipulation for dismissal—which I did not get into with him in the telephone conversation. I told Rutledge then, and again when we saw him after the meeting in Judge Carl's court, that Bill Mandy was out of town yesterday and that today Blue Cross was closed for Good Friday, so that it would be difficult to get any answer before Monday of next week. I did convey the proposal to Gene Thrasher yesterday, but after postpone-

ment of the class certification hearing I suggested to him that we discuss it on Monday.

Very truly yours,

LANGE, SIMPSON, ROBINSON
& SOMERVILLE
/s/ William G. Somerville, Jr.

WGSjr/ser

cc: Ms. Pamela C. Blalock
Mr. William H. Mandy
Mr. E. G. Thrasher

DEFENDANT'S EXHIBIT 3

BLUE CROSS
BLUE SHIELD
of Alabama

Date: April 10, 1985

Inter-office Memo

To: Phillip Pope

From: A. Grey Till, Jr.

Subject: *Embry vs. Blue Cross and Blue Shield of Alabama*

Civil Action No.: CV 84-500-447 JDC
Circuit Court, Jefferson County

Discussions between respective counsel for the parties in this pending case filed as a class action against the Corporation have now resulted in a settlement agreement, a part of which includes an agreement on our part to pay a portion of Judge Embry's legal fees in bringing this action. From our standpoint, the settlement amount represents only a small portion of what we would otherwise be faced with in terms of litigation costs and allocation of management, computer and other resources to defend a complex class action case.

Per Mr. Mandy's approval, please have a check issued in the amount of $30,000 payable to Judge Embry's legal counsel, Rutledge, Fay and Kelly, P.C., Suite 1300, Brown Marx Tower, Birmingham, Alabama and return to me for transmittal to Lange, Simpson to exchange with opposing counsel as a part of the settling agreement conclusion.

AGT:kc

Approved:

_____ _____
William H. Mandy Date

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NUMBER:
CV-84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

STIPULATION FOR DISMISSAL

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a)(1) of the Alabama Rules of Civil Procedure, hereby stipulate that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased aware-

ness of the important need, and its intensified commitment to exert its efforts, for the timely and efficient processing of such claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims, Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, in accordance with and pursuant to the foregoing, each party, as evidenced by the signatures

below of their respective counsel of record, stipulates and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the — day of March, 1985.

T. ERIC EMBRY

BY: /s/ W. Eugene Rutledge
As His Attorney

BLUE CROSS AND BLUE SHIELD
OF ALABAMA

BY: _____
As Its Attorney

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NUMBER: CV-84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000.

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated March ,1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and accordingly that this action be, and the same is hereby, dismissed with prejudice, with the parties to bear their own costs.

DONE and ordered this the — day of March, 1985.

.....

Circuit Judge

DEFENDANT'S EXHIBIT 4

BLUE CROSS
BLUE SHIELD
of Alabama

PO Box 995
450 Riverchase Parkway East
Birmingham, Alabama 35298
(205) 988-2100

April 10, 1985

Mr. William G. Somerville, Jr.
Lange, Simpson, Robinson & Somerville
1700 First Alabama Bank Building
417 North 20th Street
Birmingham, Alabama 35203

Re: *Embry vs. Blue Cross and Blue Shield of Alabama*

Dear Bill:

Enclosed is our check in the amount of $30,000 payable to Rutledge, Fay & Kelly, P.C. as part payment for Judge Embry's legal fees associated with the above lawsuit as per the settlement agreement now being concluded.

With kindest personal regards, I remain

Very truly yours,

/s/ A. Grey Till, Jr.
Vice President and
General Counsel

AGT:kc

Enclosure

Blue Cross
Blue Shield
of Alabama

450 RIVERCHASE PARKWAY EAST
P.O. BOX 995
BIRMINGHAM, ALABAMA 35298
(205) 988-2100

REMITTANCE STATEMENT

№ 38177

DATE	REFERENCE	GROSS	PERCENT	DISCOUNT	NET
1-10-85	512X	30,000.00			
	TOTALS	30,000.00			30,000.00

CK-5 (REV. 6-79)

A-100

Blue Cross
Blue Shield
of Alabama

450 RIVERCHASE PARKWAY EAST
P.O. BOX 995
BIRMINGHAM, ALABAMA 35298
(205) 988-2100

PAY TO THE ORDER OF	CHECK DATE	CHECK NO.	AMOUNT
RUTLEDGE, FAY & KELLY, P.C.	4-10-85	38177	$30,000.00

AMSOUTH
AmSouth Bank N.A.

⑈038177⑈ ⑆062203560⑆ 27⑈ 10004890⑈

A-101

DEFENDANT'S EXHIBIT 5

Law Offices

LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Building
Birmingham, Alabama 35203

Telephone 252-7000 Area Code 205

April 11, 1985

W. Eugene Rutledge, Esq.
1300 Brown Marx Tower
Birmingham, Alabama 35203

Re: T. Eric Embry v. Blue Cross/Blue Shield
Civil Action No.: CV 84-500-447 JDC

Dear Gene:

Enclosed in connection with the above case are the original and two copies of a Stipulation for Dismissal, two copies of an Agreement between Judge Embry, you, and us, and a check payable to you in the amount of $30,000. We previously discussed the substance of the enclosed Agreement.

It would be appreciated if you would sign and return to me the original and copies of the Stipulation for Dismissal and of the Agreement. I then will have them signed, have the Stipulation for Dismissal and Order of Dismissal filed and entered, and have copies of the signed Agreement, Stipulation, and Order returned to you for your file.

Very truly yours,

LANGE, SIMPSON, ROBINSON
& SOMERVILLE

/s/ William G. Somerville, Jr.

WGSjr/ser
Enclosures

cc: Henry E. Simpson, Esq.

bcc: Mr. A. Grey Till, Jr.

AGREEMENT

It is hereby agreed by and between T. Eric Embry and his attorney, W. Eugene Rutledge, and Blue Cross & Blue Shield of Alabama and its attorney, William G. Somerville, Jr., that none of them will disclose to any other person or party any circumstances or grounds for the resolution and dismissal of the suit styled *T. Eric Embry, Plaintiff, etc., v. Blue Cross & Blue Shield of Alabama, Defendant,* Civil Action No. CV 84-500-447-JDC in the Circuit Court for the Tenth Judicial Circuit, Equity Division, other than the Stipulation for Dismissal and Order of Dismissal on file as a part of the record in said suit.

_____

T. Eric Embry

_____

W. Eugene Rutledge
Blue Cross & Blue Shield
of Alabama

BY: _____

Its _____

_____

William G. Somerville, Jr.

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO.: CV-84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

STIPULATION FOR DISMISSAL

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a)(1) of the Alabama Rules of Civil Procedure, hereby stipulate that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for an intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims ~~of covered members~~ in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the

Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members of their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the — day of April, 1985.

T. Eric Embry

By: /s/ W. Eugene Rutledge
As His Attorney

Blue Cross and Blue Shield
of Alabama

By: /s/ William G. Somerville, Jr.
As Its Attorney

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby, dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the — day of April, 1985.

Circuit Judge

DEFENDANT'S EXHIBIT 6

BLUE CROSS AND BLUE SHIELD OF ALABAMA
P.O. Box 995
450 Riverchase Parkway East
Birmingham, Alabama 35298
(205) 988-2100

April 19, 1985

Dr. William C. Walsh
Deputy Secretary/Treasurer
Retirement Systems of Alabama
Retirement Systems Building
135 South Union Street
Montgomery, Alabama 36170-4101

Dear Dr. Walsh:

I am pleased to report to you that we have amicably concluded the lawsuit brought by Judge Eric Embry against us purporting to represent all state employees. Attached is a copy of a Stipulation for Dismissal which has recently been signed by all parties and has now been filed with the court here in Jefferson County. We are most pleased that this case could be resolved without further disruption to our arrangement with the State Employees' Insurance Board, and we wanted you to be aware of this development.

Very truly yours,

Dick Jones
Vice President, Sales

DJ:kc
Attachment

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO.: CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

STIPULATION FOR DISMISSAL

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a)(1) of the Alabama Rules of Civil Procedure, hereby stipulate that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for an intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated

above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the — day of April, 1985.

T. Eric Embry

By: /s/ W. Eugene Rutledge
As His Attorney

Blue Cross and Blue Shield
of Alabama

By: /s/ William G. Somerville, Jr.
As Its Attorney

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby, dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the — day of April, 1985.

Circuit Judge

DEFENDANT'S EXHIBIT 7

BLUE CROSS AND BLUE SHIELD OF ALABAMA
PO Box 995
450 Riverchase Parkway East
Birmingham, Alabama 35298
(205) 988-2100

April 29, 1985

Mr. William G. Somerville, Jr.
Lange, Simpson, Robinson & Somerville
1700 First Alabama Bank Building
Birmingham, Alabama 35203

Subject: Embry v. Blue Cross and Blue Shield of Alabama

Dear Bill:

Enclosed are two executed copies of the confidentiality agreement in connection with the Embry case.

Very truly yours,

/s/ A. Grey Till, Jr.
Vice President and
General Counsel

AGT:kc
Enclosures

cc: William H. Mandy
E. Gene Thrasher
Dick Jones

Law Offices

LANGE, SIMPSON, ROBINSON & SOMERVILLE

Ormond Somerville
White E. Gibson, Jr.
Robert McD. Smith
Allen D. Rushton
James E. Simpson
James L. Clark
Henry E. Simpson
William G. Somerville, Jr.
John E. Grenier
Lawrence B. Clark
Joseph W. Mathews, Jr.
Harry L. Hopkins
John B. Tally, Jr.
Lewis W. Page, Jr.
Richard P. Carmody
Charles C. Pinckney
Robert D. Hunter
L. Burton Barnes, III
Atley A. Kitchings, Jr.
Peyton Lacy, Jr.
Stephen A. Rowe
M. Ann Huckstep

1700 First Alabama Bank Building
Birmingham, Alabama
35203

———

Telephone
(205)
250-5000
Telecopy
(205)
250-5034

April 25, 1985

Robert D. Eckinger
John W. Gant, Jr.
Craig A. Alexander
James N. Nolan
Lynn Baxley Ault
Janet W. Taylor
Paul E. Toppins
Fred J. McCallum, Jr.
Augusta S. Dowd
Johnnie Frank Vann
Sally Sharp Reilly
Thomas S. Woodroof, Jr.
Gail M. Pugh
Barbara F. Olschner

Ray L. Lange
(1887-1966)
James A. Simpson
(1890-1973)
Memory L. Robinson
(1901-1962)
Reid B. Barnes
(1903-1984)

Mr. A. Grey Till, Jr.
Vice-President & General Counsel
Blue Cross and Blue Shield of Alabama
P. O. Box 995
Birmingham, Alabama 35298

Re: Embry v. Blue Cross and Blue Shield of Alabama

Dear Grey:

Enclosed are three copies of the confidentiality agreement in connection with the above case which have been signed by Judge Embry and Gene Rutledge.

I would appreciate your having them signed on behalf of Blue Cross and return two copies to me.

Very truly yours,

LANGE, SIMPSON, ROBINSON
& SOMERVILLE

/s/ Bill
William G. Somerville, Jr.

WGSJr/ds
Enclosures

DEFENDANT'S EXHIBIT 8

AGREEMENT

It is hereby agreed by and between T. Eric Embry and his attorney, W. Eugene Rutledge, and Blue Cross & Blue Shield of Alabama and its attorney, William G. Somerville, Jr., that none of them will disclose to any other person or party any circumstances or grounds for the resolution and dismissal of the suit styled *T. Eric Embry, Plaintiff, etc., v. Blue Cross & Blue Shield of Alabama, Defendant,* Civil Action No. CV 84-500-447-JDC in the Circuit Court for the Tenth Judicial Circuit, Equity Division, other than the Stipulation for Dismissal and Order of Dismissal on file as a part of the record in said suit.

/s/ T. Eric Embry
/s/ W. Eugene Rutledge
Blue Cross & Blue Shield of Alabama

By /s/ A. Grey Till Jr.
Its Vice President & General Counsel

/s/ William G. Somerville, Jr.

DEFENDANT'S EXHIBIT 9

CIRCUIT COURT, MOBILE COUNTY, ALABAMA

HENRY GARRARD CLAY)
No. CV78-001148 Judge KITTRELL)
NATIONWIDE INSURANCE CO., A CORP.)

I, Maurice W. Castle, Jr., Clerk of the Circuit Court of Mobile County, in and for Mobile County, State of Alabama, do hereby certify that on this day the said Circuit Court made the following order in the above entitled case, viz. —

11-6-85-Deft-Appellant, Nationwide Mutual Ins. Co's, motion for leave to take deposition pending appeal.

NOVEMBER 8, 1985 — MOTION GRANTED.

/s/ Braxton L. Kittrell, Judge

Witness my hand this the 12th day of November, 1985.

Attest: /s/ Maurice W. Castle, Jr.

MAURICE W. CASTLE, JR., Clerk
Circuit Court, Mobile County,
Alabama

DEFENDANT'S EXHIBIT 10

This document is reprinted, *supra*, in its entirety at pages A-30 to A-31.

DEFENDANT'S EXHIBIT 11

Law Offices Of

RUTLEDGE AND KELLY, P.C.
1300 Brown Marx Tower
2000 First Avenue North
Birmingham, Alabama 35203

W. Eugene Rutledge (205) 322-8761
Kay S. Kelly
Cylde E. Riley

April 12, 1985

Bill Somerville, Esq.
LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Building
Birmingham, Alabama 35203

RE: T. Eric Embry v. Blue Cross and Blue Shield of Alabama CV-84-500-447-JDC

Dear Bill:

I am returning the signed "Stipulation of Dismissal". Please have the Order entered and send me a copy of everything.

I have deposited the $30,000.00 check and sent my trustee check to Judge Embry along with the confidentiality agreement. He has agreed to execute the confidentiality agreement and return it to me on Monday. I will get it back to you then.

Best Regards,

RUTLEDGE & KELLY, P.C.
/s/ Gene
W. Eugene Rutledge

WER/kh
Encls.
C:211

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. CV 84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

V.

BLUE CROSS AND BLUE SHIELD
OF ALABAMA,

Defendant.

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby, dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the —— day of April, 1985.

Circuit Judge

CIRCUIT JUDGE
IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CIVIL ACTION NO.: CV-84-500-447-JDC

T. ERIC EMBRY,

Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Policy Number 13000,

V.

BLUE CROSS AND BLUE SHIELD
OF ALABAMA,

Defendant.

STIPULATION FOR DISMISSAL

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1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems

have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for and intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the —— day of April, 1985.

T. ERIC EMBRY

BY: /s/ W. Eugene Rutledge
W. Eugene Rutledge
As His Attorney

BLUE CROSS AND BLUE SHIELD OF ALABAMA

BY: /s/ William G. Somerville, Jr.
William G. Somerville, Jr.
As Its Attorney